on simil. of Hands A 15 J. a

DISSERTATION

SHEWING THE

INVALIDITY

June 26 Of all PROOF by

SIMILITUDE *of* HANDS,

IN

CRIMINAL CASES.

The whole collected from the Civil Law and other diſtinguiſhed Authorities, founded on the Principles of Reaſon and Equity, and digeſted with a Clearneſs that ſuits it to all Capacities.

Tranſlated from the Works of an eminent *French* Civilian, and proper to be read by a *Free People* at all Times, but particularly the preſent, when a *new Species of Treaſon*, and that by way of *Correſpondence*, has been lately created, the extreme Danger of which to the moſt innocent Perſon living, is ſet forth at large in an ample Preface by the Tranſlator.

Non enim qui accuſatur, ſed qui convincitur reus eſt.
Cap. Car. Mag. L. 7. cap. 186.

Satius eſt impunitum relinqui facinus nocentis, quam innocentem damnare. Cod. L. 5. de Pœnit.

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MDCCXLIV.

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To the RIGHT HONOURABLE

PHILIP Earl of *Cheſterfield*, Baron *Stanhope* of *Shelford*, and Knight of the moſt noble Order of the Garter.

MY LORD,

IN an Age wherein it ſeems to be the chief Buſineſs of Parliament to raiſe Money and multiply penal Laws; and when all Advantages are taken of the Subject in virtue of ſuch Laws, 'tis the Duty of every untainted Citizen, to endeavour mitigating an Evil he has not the Power to remove. This, my Lord, was my View in rendering the following Treatiſe intelligible to every *Engliſh* Reader: For to know one's Danger is one means of avoiding it; and there is no Caution unneceſ-

ſary in ſuch Times as the preſent, when the Confuſions natural to a *French* War may be made a Handle of by the worſt to oppreſs the beſt of our Fellow Subjects.

Who can ſay he is ſafe in Life, Liberty or Character, whilſt Forgerers are encouraged by the Practice introduced into our Courts of Judicature, (1) of admitting Proof by *Similitude of Hands*, in criminal Proſecutions? Are not Forgerers Weeds that grow in every Soil, and perhaps in ours more than any? And is any Land free from Men in high Stations, who would employ ſuch Engines to oppreſs thoſe who oppoſe their Meaſures, and unveil their Views?

In the late Diſtractions of a ſham or intended *French* Invaſion, how great were the Fears of all good Men for many worthy Patriots, who virtuouſly watch over our Libertis? But, my Lord, their Dread was moſt for your Lordſhip, whom they look upon as the preſent faireſt Example of ancient *Engliſh* Virtue, and warmeſt Aſſerter of Liberty. Long may you continue, what not only this, but all the Nations of *Europe* deem your Lordſhip to be, the Terror of your bleeding Country's Enemies, and Delight of her Friends!

The learned Work I here do myſelf the Honour to inſcribe to your Lordſhip, points out very clearly the dangerous Conſequences of this Male Practice; which I take to be as unwarranted by our Laws, as it is by that of God, by the Civil, and by the municipal Laws of all the Nations

(1) Some few of our Judges indeed, have heretofore refuſed the Admiſſion of this Sort of Proof; but we are not ſure that all future Magiſtrates will be ſo reſerv'd and equitable, unleſs tied down by a poſitive Law.

tions in *Europe:* and is it not very extraordinary, that one ſo deſtructive of Liberty, and warranted by no Law ſhould have prevailed in a free Country? But the pernicious Prevalence ſhews but too evidently the Force of Corruption and Influence of Courts, whence, too ſurely, it ſprung, as moſt or rather all other public Evils do.

Were ſome Moderns to be reaſon'd into Acts of Juſtice and Humanity, we ſhould not doubt that your Lordſhip's perſuaſive Eloquence would procure us a legal Security againſt a Practice, that ſtrikes now more than ever, at the very Root of all that is dear to Man. Were they to be influenced by Example, they would reform by your Lordſhip's; but alas! where Corruption preſides, Example has no Influence, nor Orat'ry Perſuaſion.

The fatal Depravity, however, is not ſo general but that there are ſome among us, who not only ſpurn the Infection from them, but look down with Contempt on thoſe who ſupport themſelves by ſpreading it; and, my Lord, think me not, I humbly entreat you, an Adulator, if I ſay, that your Lordſhip ſhines brighteſt of that glorious Band, and are ſo confeſſed, by the united Voice of all who wiſh well to *England.*

After ſaying thus much, tho' a Truth, I dare not apologize for not applying to your Lordſhip before I would prefix your Name to my Labours. As you are the firſt of *Engliſh* Patriots, I was determined to ſhelter a Work calculated for the Aſſertion of *Engliſh* Liberty under your Protection; and who ſo well intitled as your Lordſhip, on whom the public Views and Hopes ſeem to be fix'd? But being thus reſolved, and

unable to ſtifle all the advantagious Truths, I long'd for an Opportunity of ſaying of one who deſerves ſo highly of his Country, I muſt have been weaker than a very *late Dedicator*, and muſt have deemed your Lordſhip to be vainer than his Patron, who is ſaid not only to have permitted but encouraged, and even to have *inſpected* the moſt fulſom, becauſe the untrueſt, Panegyric that ever was wrote; I ſhould, I ſay, give room for being thought, by all *By-ſtanders*, weaker and vainer than that Author, had I attempted aſking Leave, after I had reſolved to ſay more of your Lordſhip's Virtues, than would ſuit with the uncommon and amiable Delicacy of your Taſte.

But that I may not fall into the Error I endeavoured to avoid, by riſking rather to offend againſt the Laws of Politeneſs than Modeſty, I ſhall conclude with wiſhing, that your Lordſhip's nervous Eloquence may perſuade, and your Example influence; that you may live to ſee the good Effects of both; and that your heroic Firmneſs and Integrity may be as amply rewarded hereafter, as they are admired and revered at preſent. This, my Lord, is the Wiſh of all, who would perpetuate the Freedom of theſe Nations, and moſt ſincerely of mine, who am, in a particular Manner, and with the utmoſt Deference,

My Lord,

Your Lordſhip's moſt humble,

and moſt obedient Servant,

The

The Tranſlator's Preface.

THE original Treatiſe, the Tranſlation of which is now offered to the Public, was printed at *Paris* for *Henry Charpentier*, a Bookſeller in the *Palais*, in the Year 1704, under the Title of *Traitè de la Preuve par Comparaiſon d'ecritures*. The learned Author was of a Profeſſion, which in *France* hath ever diſtinguiſhed itſelf in the Cauſe of Liberty and Juſtice, and by its united Efforts in oppoſing all Invaſions of either, hath upon remarkable Occaſions forced the moſt abſolute Miniſters to retract their Meaſures, and give up Points which they were the moſt reſolutely determined to carry. The Advocates admitted to plead before the Parliament of *Paris*, form a Body united under the Preſidency of their *Senior*, who is ſtiled the *Dean*; and aſſembling together upon his Summons take their Reſolutions in common. On the laſt Invaſion made by the late Cardinal *de Fleury* upon the Rights and Freedom of that Parliament, the Advocates met, and ſigned a Reſolution, that they would not plead in any Cauſe, till Juſtice was done to the Parliament, and would perſiſt in ſuch Refuſal, notwithſtanding any Perſecution or Sufferings they might be expoſed to on that account. This was done with an Unanimity that is really amazing, there being but one diſ-

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ſenting Voice in all the Faculty : and that of a Man, who was one of the richeſt of the Number, eminent above the reſt for his Eloquence and Talents; and who, for that Reaſon, had a greater Flow of Buſineſs than any, but who had abuſed his Parts, and proſtituted his venal Pen to gloſs over and ſupport the arbitrary Meaſures of the Cardinal.

Whether Avarice, Vanity or Ambition corrupted the Man, and betrayed him into ſo mean and diſhonourable a Compliance with the View of the Miniſter, he gratified in the End none of thoſe Paſſions : and this falſe Step proved his Ruin. The Gentlemen of *France*, and all that were animated by a public Spirit, admiring and ſupporting the generous Reſolution and Firmneſs of the other Advocates, reſolved, by a general Conſent, and without any regard to the Succeſs of their Lawſuits, to have nothing to do with a Man who had ſacrificed the Privileges of Parliament, and the Intereſts of his Country, to ſelfiſh Conſiderations : he remained from that Moment unemployed, unconſulted, avoided and deſpiſed by all the World, and wanting his uſual Fees, whilſt ſenſeleſs of Shame he ſtrove to brazen out the Matter, and keep up his uſual Figure, was ſoon reduced with a numerous Family to Indigence. The Cardinal indeed took ſome Pity on him in theſe Circumſtances, and gave him a Penſion juſt ſufficient for a bare Subſiſtence ; ſo that he now drags on a miſerable Life with Infamy and Remorſe ; a wretched Monument of the Neglect which Tools grown unſerviceable meet with from the Miniſters that corrupt them, and of the unlamented Ruin

which

which ſuch worthleſs Creatures draw upon themſelves by the Sacrifice of their Virtue and Reputation.

The Advocates on the contrary had the Satisfaction to ſee their Integrity and Fortitude crowned with all the Succeſs they could deſire. A Stop was put at once to all Law Proceedings throughout the Provinces of *France* ſubject to the Juriſdiction of the *Parliament of Paris:* And the Cardinal dreading the Conſequences of that general Uneaſineſs and Confuſion into which the greateſt Part of the Kingdom was thrown on that Occaſion, was forced to revoke his Meaſures. Such an Inſtance of heroic Virtue in a Country long ſince enſlaved by means of an heavy Load of ſtanding Taxes, impoſed at firſt by their own Conſent to maintain their Wars with *England*, but continued afterwards by the Power of their Kings, ſupported by a ſtanding Army, cannot but appear wonderful to a Nation, which proud of its ancient Liberty, but fonder of pretending to the Shew, than of exerting the Spirit of it which animated their Anceſtors, affords no Inſtances of the like Nature. Nor can better be expected, whilſt, in the common Uſage of the World, Riches, however acquired, ſtill run away with the exterior Marks of a Reſpect which is due only to Virtue, and in the ordinary Practice of the Law, a large Fee will eaſily reconcile a Cauſe of the groſſeſt Iniquity to the Conſcience of a Pleader; and a Deſire of Gain hath ſo far corrupted the Minds of Men habituated to it by daily and continual Exerciſe, that the firſt and moſt honourable Poſts of the Law ceaſe any longer to move by their Dignity,

Dignity, and the means they afford of ſerving the Public, and are ſcarce thought worthy the Acceptance of a popular Council. The uſual Fee in a Cauſe before the Parliament of *Paris* (and I never heard finer Pleadings than at that Bar) is but half a Guinea; and were the Fees of our Lawyers, now riſen to an exorbitant or monſtrous Height, reduced to the like reaſonable Standard, we might perhaps (as the Love of Money is the Root of all Evil, and the Appetite for it increaſes in Proportion to the Meaſure of its being gratified) hope to ſee them rival the others in Point of Integrity. The Nation, at leaſt, could not ſuffer by a Trial of the Experiment!

The *French* Lawyer, to whom we owe the following Treatiſe, wrote it to aſſert the natural Rights of Mankind, and to oppoſe ſome Attempts made in Favour of a Practiſe, which if once eſtabliſhed, would have afforded corrupt Miniſters an Handle to pervert Juſtice, and oppreſs Innocence at their Pleaſure. In *France*, as well as in all other Nations of *Europe* (except *England*) the *Civil Law* is as it were the common or municipal Law of the Country, except in ſome Diſtricts where it is derrogated from in certain Caſes by the Force of particular Cuſtoms. This Law ſeeming in the ſingle Caſe of Forgery in Writings and Contracts to allow a Compariſon of Handwriting, in Conjunction with other Proofs better authoriſed by Law, and more convincing in their Nature, to be made uſe of for Diſcovery of the Truth, there are a certain ſtanding Number of experienced Writing-Maſters (called, in *French*, *Experts*) who are ſuppoſed to be as capable of diſtin-

diſtinguiſhing the various Strokes of a Pen in Writing, as good *Connoiſſeurs* are thoſe of different Pencils in Painting; choſen out of the Practitioners in that Buſineſs, as Men diſtinguiſhed by their Senſe of Religion, and Regularity of their Lives, as well as by their Skill, their Judgment, and their Probity; admitted regularly by the Parliament of *Paris*, and other Courts of Judicatories (like Attorneys in ours, or Proctors in Doctors Commons) and ſworn, (like Appraiſers on ſome Occaſions among us) to deliver their Judgment impartially in Caſes where Merchants or others deny their Hand, or it is pretended that any Writing is counterfeited. Such Precautions are there taken in the *only* Caſe wherein it is permitted to have Recourſe to the Compariſon of Hands. To admit the Depoſitions of *Meſſengers* in ordinary, or little *Clerks of the Poſt-Office*, in ſuch a Caſe, would by the wiſe Magiſtrates that preſide in thoſe Tribunals be deem'd inconſiſtent with common Senſe; the Offer (had any the ſtrange Aſſurance to make it) would have been rejected by them with an uncommon Indignation, even in *Civil* Cauſes, and with an Abhorrence not eaſy to be deſcribed, in *Criminal* Caſes.

Some Endeavours however, in the Way of Writing, having been uſed to extend this kind of conjectural Proof in *Civil* Cauſes, and to introduce it in *Criminal* Proceedings, the Author of the following Tract thought it a Duty he owed his Country to employ his Pen in oppoſing ſo dangerous an Innovation. He ſhews it to be contrary to the whole Tenor of the *Civil Law*, which never intended to authorize it, however it had

been in ſome particular Inſtances of a Nature purely civil; and that it was a Practice unknown to all the Ancients, particularly to thoſe moſt diſtinguiſhed by their Wiſdom, the *Greeks* and *Romans*, and forbidden by God himſelf in the *Jewiſh* Law, and in the *Chriſtian* Inſtitutes. He repreſents with great Force the utter Inconſiſtency of it with all the Maxims of Reaſon and Equity; and has ſet the Injuſtice, the Uncertainty, the Invalidity, and the Danger thereof in ſo clear a Light, that every one will ſee there is little Reaſon to credit it in *Civil* Caſes, and it would be downright Madneſs to admit it in *Criminal* Proſecutions.

It hath not indeed as yet been commonly received in our Courts of Law for legal Evidence in criminal Matters. For in *Algernoon Sidney*'s Caſe, the Proof of the treaſonable Papers charged upon him did not reſt only on the Compariſon or Similitude of his Hand-writing, but was eked out by thoſe Papers being found in his Poſſeſſion by Sir *Philip Lloyd*, upon the very Table on which he uſed to write in his Study: and yet this Judgment was afterwards reverſed by Parliament as *manifeſtly unjuſt*. Lady *Carr* being in Time of King *Charles* II. proſecuted in the King's Bench upon an Information of Perjury, and a Letter under her own Hand, proved in this Manner, being produced to ſupport it, the Lord Chief Juſtice *Kelyng*, Sir *Wadham Wyndham*, and other Judges of that Court poſitively denied it to be Evidence in that Caſe; which yet was not *Treaſon*, but only a *Miſdemeanour*. In the Reign of King *James* II. at the Trial of the ſeven Biſhops, the Queſtion

Queſtion aroſe, whether *Similitude of Hands* was a Proof in a criminal Matter, and it was not admitted. Even ſince the Revolution, in *Crosby*'s Caſe, the Hand-writing was ſworn to by three poſitive Witneſſes, and owned in one of the Papers by the Priſoner himſelf; yet Lord Chief Juſtice *Holt* and the Court held it no Evidence, *Becauſe one Hand may be like another, and Preſumptions ſhall never take Place in Treaſons.*

There is much ſtronger Reaſon in our Country to reject all Evidence of this kind, than there is in any other Nation throughout *Europe*; becauſe they are much more ſtrict abroad in examining into the Character and Credibility of Witneſſes, than we are in *England.* There, every Perſon that has been convicted of writing a defamatory Libel, of *Forgery*, *Slander*, *Bribery*, *Extortion*, or *any other Crime*, is incapable of being a Witneſs; and every thing that ſhews a Defect of Probity in a Man, is a ſufficient Exception to his Teſtimony, nor can a Witneſs liable to ſuch Exception be ever admitted for an Evidence (1). But here in a Country, where Apprentices are trained up from their earlieſt Youth to ſwear by the great his Maſter's Goods (of which they know nothing in particular) out of the Cuſtomhouſe; where Oaths are multiplied to a Degree never known upon Earth before, and extended to Caſes and Perſons of which there is no Example in foreign Countries; ſo that all Senſe of the Sacredneſs of an Oath, (the only Security a Man hath for his Life and Fortune) ſeems in a manner loſt among us; the vileſt Raſ-

(1) Domat's *Loix Civiles*, p. 248.

cals upon Earth, the moſt notorious Miſcreants, the moſt declared Atheiſts, the moſt abandoned Proſtitutes, Creatures void of all Notions of Honour, Virtue, Religion or Morality, ſhall be admitted as *legal* Evidences. We had, in *A. D.* 1696, a remarkable Inſtance of this kind in the Perſon of *Cardel Goodman*, who tho' proved to be (as the Terms of the Record are) *of a wicked Mind, and of an ungodly and deviliſh Diſpoſition and Converſation*, and convicted of having given 40 *l.* to *A. Amydei* an *Italian* Empiric (with a Promiſe of 100 *l.* more, and Maintenance abroad during Life) to poiſon the Dukes of *Grafton* and *Northumberland* (the Record whereof was produced in Court) was yet admitted to be an Evidence againſt Mr. *Peter Cook*; and his Depoſition (in ſpite of the concurring Teſtimony of ſeveral Perſons contradicting the Matter of it, and various Circumſtances which rendered it on other Accounts ſuſpicious) ſerved to forfeit the Life and Eſtate of that unfortunate Gentleman, who otherwiſe muſt have been acquitted (2). Every Body knows that this ſame *Poyſoner*'s Evidence, and his withdrawing beyond Sea, ſerved likewiſe for a Ground or Pretence to that extraordinary Act of Attainder againſt Sir *John Fenwick*.

There is another very ſtrong Reaſon, why Compariſon and Similitude of Hands ſhould be leſs admitted to have the leaſt Degree of Proof in *England*, than in other Countries. In the latter, the Puniſhments of Perjury bear ſome Proportion to the Crime; and the falſe Accuſer ſuffers the ſame

(2) See the 4th Vol. of *State Trials*, Edit. 1719, p. 195, 196.

ſame Penalty as the accuſed Perſon would have done in caſe he had been convicted. So that in capital Caſes it is Death, according to the *Lex Talionis*, eſtabliſhed by God Almighty in the *Jewiſh* Law, and by the *Romans* in the *Civil Law*, which is received all over *Europe*, except in this Kingdom. Whereas here, the Puniſhment of Perjury when detected, even in capital Caſes, far from being adequate to the Offender's Guilt, is too light to give any Terror to an hardened Wretch, who muſt be ſuppoſed loſt to all Senſe of Shame and Remorſe of Conſcience before he could embark in ſo execrable a Villany. The late Dr. *Sprat* Biſhop of *Rocheſter*, who had like to have ſuffered Death by a Forgery (of which he publiſhed an Account) in 1692 (3), complains very feelingly on this Subject (4); "What would "it have availed me, ſays he, or my Family, in "this World at leaſt, ſhould I have died, as "guilty of Treaſon, by this Villain's falſe Teſ-"timony, if afterwards upon the Detection of "his Perjury, (as I am perſuaded God would "not have ſuffered ſo horrid a Villainy to proſ-"per, or remain long undiſcovered.) I ſay, "what great Comfort or Compenſation had it "been to my Family and my Friends, if, after "my unjuſt Execution, they had heard that the "wicked Author of it had ſtood once more in "the

(3) Relation of the late wicked Contrivance of *Stephen Blackhead*, and *Robert Young*, againſt the Lives of ſeveral Perſons, by forging an *Aſſociation* under their Hands. Printed for *Edward Jones* in the *Savoy*, *A. D.* 1692.

(4) Ibid. p. 158.

" the Pillory, and perhaps loſt the Tip of his " Ear.

The good Biſhop happily eſcaped the Snare laid for him by the greateſt Chance in Nature, or rather by a ſignal Interpoſition of the Divine Providence in his Fovour, as he expreſſes it himſelf (5), " I hope, ſays he, I may ſay without Va- " nity, that perhaps it is hard to meet in ſome " whole Ages, with many Examples wherein the " Divine Favour has ſnatched any private Perſon " out of ſuch imminent Danger, with a more " viſible Hand, than it has done me out of this. " Why may I not be allowed to ſay thus much? " Since it is ſo manifeſt, that the Deſtruction or " Preſervation of me and mine depended on the " Clerk of the Council's turning to the Right " Hand or to the Left, when he entered to " ſearch my Houſe at *Bromley*. By God's Mer- " cy and Direction he turned to the Left; there " examined all Places ſo curiouſly, as to paſs by " no Corner unobſerved, yet he found nothing " on that Side worthy the Obſervation of one that " came on ſuch an Errand. Whereas had he " chanc'd to turn (chanc'd do I ſay? I can- " not believe that any thing fell out by Chance in " this whole Buſineſs: but had God permitted " him to turn) on the Right Hand, the firſt " Room he had entered was that very Parlour, " wherein was depoſited the fatal Inſtrument " of my Death: Nor could he have miſſed it, " but muſt have immediately lighted upon it, " conſidering the punctual Inſtructions he had " received to ſearch all the Chimneys and the " Flower-

(5) Relation, p. 160.

" Flower-pots in them. And had he once found " it, the Writing itſelf, *ſo nearly reſembling my* " *own Hand*, and *taken in my Dwelling-houſe*, " had ſoon overwhelm'd me with ſuppos'd Guilt, " without any farther Need of *Blackhead*'s or " *Young*'s Aſſiſtance.

As the Book is out of Print and grown ſcarce, it may not be improper to relate ſome of the Circumſtances of this Affair. *Young* having found Means to get a Sight of the Biſhop's Hand-writing, forged an Aſſociation for reſtoring King *James* II. and put to it the Names of the Biſhop, and ſome other Perſons of Quality and Diſtinction, all imitated with the greateſt Exactneſs. *Blackhead* carried this Writing down to *Bromley*, and hid it in a Flower-pot, that ſtood in the Parlour in the Biſhop's Palace. In *May* 1692, Mr. *Dyve* Clerk of the Council, and *Knight* the Meſſenger were ſent thither to ſeize on the Biſhop's Perſon and Papers, with particular Orders to ſearch all the Flowerpots in the Houſe: but providentially miſs'd the treaſonable Paper, by turning to the Left-hand inſtead of the Right. *Young* thereupon pretending it was an Original, ſent *Blackhead* again to *Bromley* to recover the *Aſſociation*; which he did, whilſt the Biſhop was confined in Town, and produced it to the Council. But Mr. *Dyve*'s Miſtake having diſconcerted the Plotters, and forced them to alter their firſt Scheme, the Biſhop found means to detect the Villany, which tho' *Young* perſiſted to the laſt, *Blackhead* leſs artful, or perhaps leſs hardened, was ſoon brought to confeſs. The innocent Prelate was thereupon diſcharged; but what all

honeſt

honeſt Men have Reaſon to lament, the vile Forger was not puniſhed to the utmoſt that the Law warrants; for as it then ſtood, and does ſtill, he could not have been puniſhed capitally; tho' had his Forgery, and the Plot built upon it ſucceeded, the Biſhop of *Rocheſter* was not the only one that might have ſuffer'd; the Hands of the then late Archbiſhop of *Canterbury*, the late Duke of *Marlborough*, Earls of *Salisbury* and *Clarendon*, and other conſiderable Perſons, being forg'd and put to the Aſſociation.

The Means by which *Young* procured a Sight of their ſeveral Hand-writings is related in the Biſhop's *Relation*, p. 145. and this was enough for him to counterfeit all their different Hands with ſo perfect a Reſemblance (6), that all the Difference the Biſhop could find in his own Name, was, that it was wrote finer than he could have wrote it himſelf: and if he had ſeen it in another Place, it would have puzzled him to determine whether it was really of his Writing or no. He is confident however, it might upon the firſt Bluſh deceive the beſt Friends he had; nor could they in a Letter feign'd under the Biſhop's Name, or the moſt intimate Friends of the Duke of *Marlborough* in one feigned under his, and calculated to give Credit to the Inſtrument of Aſſociation, obſerve any Diſtinction therein, ſo well were their Hands, and thoſe of the others whoſe Names were put to it, counterfeited.

Young indeed was an old Practitioner in that way of Forgery, was ſo perfectly well verſed in the Art of imitating all kinds of Hands, and did it

(6) Relation, Part. 1. p. 67.

it with ſuch admirable Exactneſs, that whilſt he had the Command of the Poſt-Office at St. *Alban*'s, he had copied whole Letters of Tradeſmen in the middle of *England*, and by inſerting in the middle of them Orders for the Bills he counterfeited at the ſame Time, had impoſed on their conſtant Correſpondents in *London*, and got ſeveral hundreds of Pounds paid him without the leaſt Suſpicion. And had he ſucceeded in this his firſt Attempt of employing his Talents for the forging of Plots and Aſſociations, God only knows what Numbers of innocent Gentlemen might have been ruined with their Families, and loſt their Lives by his deteſtable Practices.

The Biſhop having got the Originals of Abundance of his Counterfeit Letters, ſays (7), " That " he had ſhewn them to very many Perſons of " great Sagacity, both of the Nobility and Cler- " gy, both of Scholars and Merchants: and af- " ter an exact View and Compariſon of them " diſtinctly, *Line by Line*, *Word by Word*, *Letter* " *by Letter*, I muſt ſay all that have ſeen them " were greatly aſtoniſhed at the ſurprizing Simi- " litude between the falſe Writings and the true: " and they have done *Robert Young* the Juſtice, " as to pronounce them all to be great Maſter- " pieces of Forgery.

But what Juſtice has been done the Nation? The Biſhop publiſhed his Relation (8), " in hopes " of ſome Security being provided for other inno- " cent Perſons: and that the Attempt on him might " be ſome Warning to his Country in time to come

" againſt

(7) Relation, p. 140. (8) Pag. 155, 156.

" againſt the like wicked Forgeries, Subornations, " and falſe Plots; and earneſtly recommended ſome " ſeverer Laws againſt that worſt ſort of Forgery, " which reaches to the taking away of Men's Lives. Yet nothing of that Nature hath yet been done: Miniſters are too fond of having all the World at their Mercy, to be forward in promoting ſuch Laws: and Country Gentlemen, whilſt at their own Seats, are too much taken up with rural Amuſements and private Affairs, and when they come to Parliament, too much in a hurry to get back into the Country, ever to employ a Thought on Grievances that do not immediately preſs them, and of which they do not actually feel the Weight. It is ſtrange, however, that they ſhould ſleep at Eaſe under ſo uncomfortable a Situation. *Damocles* had but little Stomach to his Dinner, when placed at Table under the Point of a Sword that hung over his Head by a ſingle Hair. Each Man indeed fancies himſelf ſafe, becauſe he is innocent: So was Biſhop *Sprat*, yet nothing ſaved him but the Hand of Providence, which People ought not to truſt to, when they tempt it by neglecting all the Precautions which Reaſon ſuggeſts, and which it is in their own Power to take. Wiſe Men at leaſt will think no Dangers ſo neceſſary to be guarded againſt, as thoſe which are likely to burſt upon them at once, and bring Deſtruction on the ſudden; it being too late to provide againſt them whenever they come to fall on any particular, among the Thouſands who are expoſed to them continually.

What-

Whatever Apprehenſions may be ſuggeſted to any one by the Dangers which Biſhop *Sprat* ran, they are ſtill leſs than what he may naturally be entertained upon, conſidering the Fate of that Prelate's Succeſſor in the See of *Rocheſter*. This laſt was charged with carrying on a Conſpiracy, and ſuffered for it, tho' it was not proved (1) he "had "entered into any one Conſultation, concerted "any one Meaſure, gave any one Direction, or "had done any one criminal Act, or wrote or "received any one criminal Letter." There was no forged Aſſociation produced againſt him, and no Pretence could be found for attacking him, but what may be laid at any time to any Man's Charge, how innocent ſoever. He was accuſed of dictating Letters to another; and Copies being taken of three Letters dated 20 *April* 1722, and ſent by the Poſt (which after all had nothing in them that was *criminal by Law)* it was, for want of other Evidence, found neceſſary to pretend, that theſe were dictated to, and wrote by *George Kelly*, tho' it is certain they no more were written by him, than they were by *Oliver Cromwell*. To find a Colour for this Aſſertion of their being wrote by that Gentleman, the Clerks of the Poſt-Office, a never failing Reſource on the like Occaſions, not one of which had ever ſeen him write, were brought in to depoſe that they believed thoſe Letters were written in the ſame Hand as one they had ſtopped in the Poſt-Office four Months afterwards, and which they conceived to be written by *G. K.* tho' neither the one nor the other

 had

(1) See Mr. *Wynne*'s Defence of the Biſhop of *Rocheſter*.

had been verified, nor had they ever been compared together. And yet Sir *C. W.* was not aſhamed to maintain, " that this was *legal* Evi-
" dence, and that in Parliamentary Enquiries e-
" very thing is legal Evidence which may tend to
" a Diſcovery of the Truth. A Poſition fruitful in all Kinds of Miſchief that can break in upon a State; for to uſe the famous Words of Mr. *Pym* (2), " 'Tis the Law which puts a Diffe-
" rence betwixt Good and Evil, betwixt juſt and
" unjuſt; if you take away the Law, all Things
" will fall into Confuſion; every Man will be-
" come a Law to himſelf, which in the deprav'd
" Condition of human Nature, muſt needs pro-
" duce great Enormities: Luſt will become a
" Law, and Envy will become a Law, Cove-
" touſneſs and Ambition will become Laws. In
" ſhort, every thing will become legal that flat-
" ters any Paſſion of the Heart of Man.

In what a precarious Situation muſt the Liberties, Fortunes and Lives of every Man in *England* be, if ſuch kinds of Proof be admitted and paſs for legal? This would make our Condition, who fancy ourſelves a free People, worſe than that of the Subjects of *France* or of any other Kingdom in *Europe*. The Danger is at preſent the greater, by reaſon of the Terrors and Diſtractions of the Times occaſioned by a *French* War, and the Alarm of Invaſions; which may encourage Villains to lay Schemes, to forge Papers and Letters, to counterfeit Hands, and play all the

(2) Speech at ſumming up the Evidence againſt the Earl of *Strafford*.

the Game of *Young* and *Blackhead* againſt ſuch as they may fancy obnoxious to Men in Power on Account of their Steadineſs and Virtue. 'Twas in a like Juncture that *Young* imagined his Contrivance againſt Biſhop *Sprat* would be eaſily ſwallowed without Examination, and meet with Encouragement. " It was, ſays the Biſhop *(3)*, " in the Beginning of *May* laſt 1692, a Time " when perhaps there was as great a Conſterna- " tion, both in Town and Country, as was ever " known in *England*. The *Engliſh* Fleet ſcarce " out of the River, the *Dutch* for the moſt " part at home; the *French* in the Mouth of the " Channel, and only kept back by contrary " Winds; a terrible Invaſion hourly expected " from *France*; the Army beyond Sea that " ſhould have defended us; a real Plot and " Confederacy by many whiſpered about; by " the common People believed; many Perſons of " great Quality impriſoned upon that Suſpicion; " all Mens Minds prepared to hear of ſome ſud- " den Riſing or Diſcovery. In ſuch a critical " Time of Terror and Diſtraction, how very " little Evidence would have ſufficed to ruin any " Man, that had been accuſed with the leaſt " Probability of Truth? And how then had it " been poſſible for me to have ſtood the Torrent " of common Fame and Paſſion againſt ſo great " a Notoriety of Fact, had that Paper of a pre- " tended Aſſociation been really found in my " Houſe?—Would it not have been ſaid, *Can* " *he deny his own Hand? Are not the Hands of* " *the*

(3) Relation, p. 162.

" *the reſt well known? Was it not found in his*
" *Houſe? In ſo ſecret a Place there? Who could*
" *have laid it there but himſelf?* This certainly
" would have been the univerſal Clamour.

In that Biſhop's Danger every innocent Man may learn his own. The ſtill Voice of Innocency is ſcarce to be heard during the Noiſe of Diſtractions and Terrors; Terrors which are apt to betray the Reaſon of the wiſeſt, and make them in the Hurry of their Thoughts forget what they owe to themſelves, their Poſterity, the Conſtitution, and their Country. No Statute ever cauſed ſo univerſal a Joy in this Nation, as that of 25 *Eliz.* 3. declaring and limiting Treaſons; and it has ever ſince been the Maxim of our Anceſtors not to multiply the Species thereof. Wiſe Reſolutions are ſeldom made in a Fright, and yet during the late Alarm it was thought proper to recede from that Maxim, and to eſtabliſh a new Species of Treaſon; tho' there was no preſent Danger that it could prevent; and being calculated to provide againſt a future and remote one, it might have been well enough reſerved for Conſideration in a cooler Juncture. Fear is the worſt Adviſer in Nature: it would elſe appear unaccountable how People in their Senſes could, after Proviſion had been made for the Removal in a ſhort Time of an Evil wholly inconſiſtent with the Spirit of Juſtice and Lenity that diſtinguiſhed our Law, ever be brought to defeat that Proviſion, and involve the *Innocent* in the ſame Puniſhment with the Guilty; a Thing contrary to the firſt Principles of natural Juſtice, and ſo oppo-

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ſite to the Genius of the *Engliſh* Nation and Government, that it never could have been introduced here but by a *Conqueſt*. For *William* the Conqueror firſt introduced the Feudal Law in all its Rigour, by which Lands held of the Crown *in capite* by *King*'s *Service*, became forfeited in caſe of Treaſon; for I am not clear that *Soccage* Tenures were likewiſe forfeited, and that the old Maxim of *The Father to the Bough, and the Son to the Plough* did not hold in them as well as in *Gavelkind*; and if ſuch Forfeitures were incident only to *Military Tenures*, when all thoſe Tenures and their Appendages were at King *Charles* Reſtoration deſtroyed by the Act which took away the Court of Wards, it might have been Matter of Doubt to ſuch as were acquainted with the Nature, original Reaſon of thoſe Tenures, and the Feudal Conditions annexed to them, whether ſuch Forfeitures were not a Part of thoſe Appendages, and conſequently aboliſhed with them.

However it be, the new Species of Treaſon, *viz. Holding Correſpondence with the Sons of the Pretender*, and lately created, expoſing by the very Nature of it, every Man in the Nation to the Practices and Villanies of the *Young*'s and *Blackhead*'s of this Age, it cannot be thought unſeaſonable to publiſh the following Treatiſe, which by the cleareſt Reaſons in Nature demonſtrates that no Pretence of Proof from Compariſon and Similitude of Hands ought ever to be allowed in Courts of Juſtice, or can deſerve the leaſt Credit from any Body. The Tranſlator imagined, that if the whole Nation had been perſuaded

ſuaded of this Truth (which is here fully proved) at the Time of the late Biſhop of *Rocheſter*'s Trial, a Bill of Pains and Penalties would have then been found a too daring Attempt for any Miniſter to make. He hopes it may be of uſe to prevent the like for the future, and ſave his Countrymen from being tried and condemned by Gueſs-work; the Gueſſes of mean, inconſiderable, ſelfiſh, corrupt, dependant, perhaps of irreligious and profligate Fellows.

INTRODUCTION.

THERE is no Proof more frequently admitted in Courts of Juſtice, than that founded on the Similitude of Hands, and yet there is none perhaps more liable to Abuſe and Error, or leſs underſtood. There are ſome who cheriſh this Sort of Proof above all others, on a Suppoſition of its being the leaſt liable to Deception; becauſe, ſay they, every Judge may form his Judgment, in regard to this Species of Proof, from the Lights of his own Reaſon and Senſes. He is under no Neceſſity, as in other Caſes, of recurring to the Opinion of others, being himſelf able to diſtinguiſh Truth from Falſhood, without any Riſk of being deceived by the Craft or Ignorance of a ſecond Perſon. Others, on the contrary, maintain that there is no kind of Proof weaker, or leſs to be depended upon, inaſmuch as the Similitude, which is the only Guide to go by, ordinarily, or rather neceſſarily, proceeds from either Art or Chance. It would be an unpardonable Imprudence, they ſay, to riſk either the Life, or Fortune, or Reputation of a Member of the Community on either the Caprice of Chance, or Faith of Forgerers, which muſt be the Caſe where Judgments are paſſed by a Proof purely conjectural.

There are others again, who, between theſe two Extremes, take a Middle, and, they think, a ſafer Courſe. They agree that Proof by Similitude of Hands may be admitted in Matters of Property or civil Caſes, but reject it abſolutely in criminal Caſes, as being far more intereſting and important. And ſome likewiſe, ſtill ſeeking a ſafer Medium, are not for rejecting wholly this Sort of Proof, nor for admitting it indifferently. They think, without ſcrupulouſly adhering to, or neglecting it, that it may be of uſe to a Judge, if he takes into his Conſideration at the ſame Time, the various Circumſtances of Time, Place and Perſons. And though this laſt ſeems the moſt reaſonable Opinion, it may nevertheleſs be ſaid, that of all others, it has authoriſed moſt Error, and cauſed the moſt Miſchief and Injuſtice. For as the Mind of Man naturally oppoſes itſelf to all Reſtraint and Subſerviency, and inclines to Liberty and Freedom of Opinion, the Adherence to this ſeemingly reaſonable Opinion, has occaſioned not only that the ſtated Maxims of Juſtice had been diſpenſed with by little and little, but that each had inſtituted new capricious Maxims of his own, by which he condemned or acquitted, in conſequence of this conjectural Proof, juſt as he was diſpoſed either by Intereſt, Humour or Inclination to believe or diſbelieve, or be ſparing or laviſh of the Life and Blood of his Fellow-Creatures.

From theſe different, and I may ſay contradictory Opinions concerning this Proof by Similitude of Hands, and particularly the laſt, it would

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ſeem as if it was a Species of Proof which ought never to be admitted in any Caſe. It would ſeem as if by adopting this Opinion or Maxim of its Admiſſion, all Order and Equity had been deſtroyed; and that inſtead of leading to Certainty and Truth, it has contributed more than any to introduce that Confuſion and Injuſtice ſo ſeverely felt, and loudly complained of.

It was theſe Conſiderations, and my regard for my Countrymen, that had determined me to ſtudy this Subject with Application. I thought myſelf obliged to conſult Originals, where, by a diligent Enquiry, I might meet Truth, which the Confuſion, introduced by the late Practice of the Bar, had almoſt baniſh'd from Law Proceedings. I ſaw the Neceſſity of recurring to the Text itſelf, where I ſuppoſed it either wholly diſuſed, or groſly abuſed, to authorize a Male-Practice introduced through Sloth or Ignorance; or which is worſe, through Malice and Ambition. I have been at the Pains of reducing to Writing the principal Maxims, upon which it ſeem'd to me, that Rules might be laid down and followed in order to arrive at Truth; and it was from theſe voluminous Extracts that I have taken this ſmall Abridgment, not with a vain Intent of inſtructing others, but for my own Inſtruction, and to engage abler Pens to treat the Subject, and inſtruct and relieve the Public.

I ſhall divide this ſmall Tract into two Parts, as Cuſtom has authorized the Practice of admitting Proof by Similitude of Hands equally in civil and criminal Caſes. In treating of the firſt Point,

I ſhall endeavour to explain the Nature of this Sort of Proof, to ſhew its Force, and how far it ought to operate in Caſes purely civil. And in my Obſervations on the ſecond, I ſhall attempt pointing out its Effects in criminal Matters. But my Obſervations of this Proof in Caſes of Property, ſhall be very ſuccinct, inaſmuch as moſt of the Difficulties attending this Diſcuſſion are already expreſſly adjuſted by the Laws themſelves, or treated of by the moſt celebrated Civilians. I ſhall but juſt touch upon this firſt Part of my Subject, contenting myſelf with pointing out the Principles on which it is founded, as neceſſary for applying them to criminal Matters, which ſeem to have been much more neglected by the Legiſlators and Interpreters, tho' of far greater Conſequence and Importance.

A

DISSERTATION

ON THE

INVALIDITY

Of all PROOF by

SIMILITUDE *of* HANDS.

PART I.

Of Proof by the Similitude of Hands in Civil Caſes.

PROOF by Compariſon of Writing or Similitude of Hands, in Civil Caſes, is very ancient, though there be no Mention made of it in the Pandects; and that even in all the (1) *Code*, or Body of the Civil Law, and in the Novels or Inſtitutes, it is named

(1) L. Comparationes Cod. de fide inſtrum. L. ubi ad l. Corn. de falſ. Cod. Nov. 45 & Nov. 73. D. l. ubi.

named but four times: *viz.* twice in the *Code*, and as often in the Novels: And even from theſe, there are but three Texts whence any general Maxims for our preſent Purpoſe can be extracted. For beſides, that the fourth is particularly relative to Forgery, of which I ſhall treat in its proper Place, the Mention made there of Proof by Similitude of Hands, ſeems rather accidental than deſigned, there being no Deſcription of its Manner, Form or Effect.

(2) The firſt Law which treats expreſly of this Sort of Proof, is to be found in the *Code* under the Title, *Of the Credit of written Inſtruments.* It was made by the Emperor *Juſtinian*, to correct an Abuſe that had been introduced in his Time, and which had, as he himſelf ſays, been productive of infinite Forgeries. And how could it be otherwiſe, when the Practice was to admit private Signatures to be produced in the Courts of Juſtice, by which conteſted Writings were compared? What Judgment could be formed; what could be the Effect of the Similitude of two Signatures or Writings whereof neither was authentic? Ought a Judge to risk the being obliged to Chance for the Rectitude of his Decrees, which muſt be the Caſe whenever a private or non-authenticated Writing is referred to, in order to prove by it a Similitude of Hands. May it not happen, that a forg'd Writing would be the Standard by which a genuine might be compar'd? And might not a Judge, who ſhould venture to determine upon no ſolider Proof, be compared to an ignorant Architect that ſhould fix the Dimenſions of an intended Edifice, without examining the Juſtneſs of the Scale and Compaſs by which he laid them down?

Theſe were the Grounds upon which *Juſtinian* built in ordaining by this firſt Conſtitution, that no Writings ſhould be admitted as Proof of the Similitude of Hands, but ſuch as was authentic, or, if of

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(2) D. l. Comparationes Cod. de fide inſtrum.

a private Nature, that it ſhould be ſign'd by three Witneſſes at leaſt.

But that Law, though reforming an Abuſe, was however productive of an Inconveniency. For it would ſeem to intend, that no private Writing whatever was to be admitted in Proof of the Similitude of Hands, unleſs ſign'd by three Witneſſes; and yet in ſome Inſtances, the Prohibition would be unjuſt. For Inſtance, when the private unwitneſs'd Writing ſhould be produced by him who was to loſe by proving the Similitude; or when it ſhould be immediately brought from ſome Archive or Place of public Depoſit. In the firſt Place, it would be a ſtrong Argument of the Inſincerity of him that ſhould object to the Admiſſion of a Writing, which he himſelf had produced as genuine, becauſe afterwards he ſhould find it ſerved the Purpoſes of his Antagoniſt: And next, with what Colour of Juſtice could a Writing be objected to, that had been taken from ſome public Archive? (3) And under what Pretext could a private Perſon form Objections to the Authentickneſs of a Writing ſtampt with public Appobation? *Juſtinian* therefore, ordained by a ſecond (4) Law, that in both theſe Inſtances, private Writings, tho' unſign'd by three Witneſſes, as aforeſaid, ſhould be deem'd authentic, and admitted to prove Similitude of Hands by: but not, as ſome imagine, as a Correction of his former Law, but rather to explain its Senſe and Meaning.

But

(3) Nov. 49. --- Scriptura privata ſumpta ex Archivo publico plene probat. --- *Du Moulin*, and many other eminent Civilians mention the Requiſites for conſtituting a public Archive, *viz.* That the Place be public, that it be where public Writings are depoſited, and that it be kept by a public Officer. Beſides, a Writing to be admitted in Proof, ſhould be atteſted by the public Officer, Mention being made whether Copy or Original.

(4) Nov. Ibid. 49.

But the Emperor ſoon perceived, that neither this laſt Law, nor that of which it was explanatory, were ſufficient to remedy the Evil; and perſuaded, that ſo long as Proof by Similitude of Hands of any Kind ſhould be admitted, private Property would be always in the Power of Forgerers, and expoſed to the Ignorance, Raſhneſs, or Baſeneſs of the Pretenders to Skill in the Operations of the Pen, he made a new Conſtitution, which it will be neceſſary to conſider in this Place, not only with regard to its Diſpoſition and Intent, but the Motives that had induced the Imperial Legiſlator to repeal his former Inſtitutions on this Subject.——The *Motives* are thus fully explain'd in the Preface or Preamble to this firſt Law.

(5) " We have conſidered the Laws now in Force " concerning Proof by Similitude of Hands; and " have

(5) Novimus noſtras leges quæ volunt, ex collatione litterarum fidem dari documentis, & quia quidam Imperatorum ſuper excreſcente jam malicia eorum qui adulterantur documenta hæc talia prohibuerunt: illud ſtudium falſatoridus eſſe credentes, ut ad imitationem litterarum ſemetipſos maxime exercerent, eo quod nihil eſt aliud falſitas, niſi veritatis imitatio. Quoniam igitur in his temporibus innumeras invenimus falſitatis in judiciis multis quorum fuimus auditores; & quoddam in opinabile ex Armenia nobis exortum eſt: Oblato namque commuetationis documento & litteris diſſimilibus judicaris, quoniam poſtea inventi ſunt ii qui de documento teſtati ſunt ſuſcriptionem ſubdentes, & eam recognoſcentes, fidem ſuſcepit documentum: & quoddam hinc inopinabile occurrit, eo quod litteræ quidem ſine fide viſæ ſunt, licet examinata reſponſa verorum teſtium cum veritate concordaverunt, & hoc per fidem teſtium quæ videtur quodammodo eſſe cauta. Videmus tamen naturam ejus crebro egentem rei examinatione; quando litterarum diſſimilitudinem ſæpe quidem tempus facit. Non enim ita quis ſcribit juvinis & robuſtus, ac Senex & forte tremens; ſæpe autem & languor & hoc facit. Et quidem hoc dicimus quando calami & atramenti immutatio ſimilitudinis per omnia

" have ſeen that ſome authoriſe the Admiſſion of ſuch " Proof, and that our Predeceſſors, by other Laws, " had intirely excluded it. (Let me ſay, by the " way, that there are no Remains of theſe laſt men- " tioned Laws to be met with now.) Theſe wiſe " Emperors, convinced by Experience, that what " had been intended to prevent the bad Effects of the " Injuſtice of particular Perſons, had opened a Gate " to Forgerers, who ſet about counterfeiting all Sorts " of Hands. As ſoon as they ſaw that Proof by Si- " litude of Hands was admitted: Theſe diſcerning " Legiſlators ſaw the Abſurdity of endeavouring to " detect a forged Writing only by its Similitude, with " one admitted of all Hands to be genuine, becauſe " Falſhood is nothing but an Imitation of that which " is true. And we ourſelves have obſerved a Multitude " of Forgeries occaſioned by the Admiſſion of this Sort " of Proof; but particularly an Inſtance in *Armenia*, " no leſs extraordinary than unexpected. A particular " Perſon having exhibited in a Court of Juſtice, a " written Contract of Truck or Exchange which was " denied by the Defendant, the Court ordered it " ſhould be proved by Similitude of Hands; ſkill- " ful † Scriveners were appointed and heard: they " could ſee no Similitude, and therefore adjudged " the Contract to be forged. Yet after all, Chance " brought Truth to Light; and the Writing, which " all the ſkillful had judg'd to be forg'd, was found " to be genuine, and own'd ſuch by all thoſe that had " ſubſcribed it as Witneſſes.

" But upon the whole, what Certainty can there " be in a Proof founded on any thing ſo uncer- " tain and variable, as a Reſemblance or Similitude of

 " and

omnia aufert puritatem: & nec invenimus de reliquo dicere quanta natura generans innovat & legiſlatoribus nobis præbet cauſas, &c.

† *In* France *there are ſtationed Writing-Maſters, named* Experts *in* French, *who conſtantly attend the Courts of Juſtice, to give their Opinion of conteſted Writings.*

" Hands ſubject to Alteration from ſo many Cauſes " and Incidents? Does any Man write always in the " very ſame Manner? What Likeneſs can be be- " tween the Strokes of Pen guided by a young vigo- " rous ſteady Hand, and thoſe produced by the ſame " Hand, when it comes to be enervated by old Age? " But what do I ſay? Is there any thing more neceſ- " ſary than the ſimple Change of a Pen or Ink (or " even of Paper) to occaſion a Diſſimilitude? In " ſhort, it is impoſſible to enumerate the Inconveni- " encies that might enſue from the Admiſſion of ſuch " Proof, and the Motives that induced thoſe Legi- " ſlators and us, *&c.*

Thus far the Preamble to this Inſtitution; and as for the Law itſelf, it ſeems too much confuſed and perplexed, occaſion'd, I ſuppoſe, by the Emperor's conſidering on one Hand, the Injuſtice that it might occaſion if a Proof ſo liable to Uncertainty and Error ſhould be admitted at all; and on the other, by an Unwillingneſs to exclude it wholly in civil Caſes. He found it difficult to reconcile Conſiderations which ſeem to claſh; or rather which are repugnant to each other. But at laſt he enacts as follows.

(2) We have taken Notice, that *Juſtinian*, by his firſt Law, excluded the Exhibition of all Writings to prove

(2) Sed et ſi quis aut mutui inſtrumentum aut alterius cujuſpiam faciat, & noluerit hoc in publico confiteri (quod & in depoſito definivimus) non ex ipſo videatur credibile quod ſcribitur ſuper mutuo documentum, niſi etiam teſtium habeat præſentiam fide dignorum, non minus trium: ut ſive veniant & propriis ſubſcriptionibus atteſtentur, ſive alii quidam teſtificentur quia præſentibus eis confectum eſt documentum; fidem cauſa ex utroque percipiat: Etiam litterarum examinatione penitus non repulſa, ſed ſola non ſufficiente augmento autem teſtium confirmanda. Si vero moriantur omnes teſtes, aut forſan abſint, aut aliter non facile ſit ædem ex teſtium ſubſcriptionibus invenire, neque tabellio ſupereſt qui complevit (ſi quidem publice ſit confeſtum) quatinus

prove Similitude of Hands that were not authentic; that is to ſay, brought from ſome public Archive and certify'd, or ſign'd by three Witneſſes. By the preſent he forbids the Proof of any Writing by Similitude of Hands, unleſs the Writing to be proved, be likewiſe witneſſed by three creditable Perſons, or by two ſuch and a Notary Public; or at leaſt, that Proof be made of its having been paſſed or perfected in the Preſence of three creditable Witneſſes. And this was not all neither; for he ordains, that the Notary and the Witneſſes that had been preſent and witneſſed at the

tinus eſt teſtimonium perhibeat pro ſe, aut non eſt in civitate: Sed neceſſe eſt omnino collationem litterarum ſuppletiones eorum qui ſubſcripſerint aſſumere: tunc competens eſt properare quidem ad comparationes (neque enim eas modis omnibus interdicimus) per omnem autem ſubtilitatem procedere. Et omnino, ſi putaverit eis judex opportere credi, etiam jusjurandum injicere proferenti, quia nihil maligni conſcius in eo quod a ſe profertur, nec quandam artem circa collationem fieri præparans ſic utitur eo: quatenus neque perimatur quicquam omnino & per omnia munitio in rebus fiat. In his vero quæ conficiuntur publice documentis, ſi tabellio venerit, & teſtimonium perhibuerit cum jurejurando, ſi quidem non per ſe ſcripſerit, ſed per aliud miniſtrantem ſibi, & ille ſi vivit, ſi quidem poſſibile omnino eſt eum venire & nulla cauſa prohibet ejus adventum, ægritudo forte valida, aut quælibet aliarum neceſſitatem que hominibus accidunt. Quod ſi etiam adnumeratorem habuerit inſtrumentum, & ipſe adveniat: ut tres ſint teſtificantes & non unus. Si vero neque adnumerator aſſumptus eſt, & inſtrumentum ipſe tabellio totum per ſe conſcripſit atque ſupplevit, aut ſi etiam qui hoc conſcripſit, non eſt, aut aliter ipſe venire non valet: tamen eum jurejurando propriæ completioni atteſtetur ut comparationi non fiat locus, ſint etiam ſic credibilia documenta. Teſtimonium enim & ex voce complentis factum, & jusjurandum habens adjectum, præbuit quoddam cauſæ monimentum. Quod ſi Tabellio defunctus eſt, & teſtimonium perhibeatur ſuppletioni ex alia collatione, ſi quidem etiam ſic habent eum qui conſcripſit inſtrumentum

viven-

the Time of its being perfected, ſhould likewiſe own their Signatures at the Foot of the Inſtrument. If the Notary, ſays the Emperor, acknowledges his Signature, the Writing becomes a public Act or Writing, which it would be as ridiculous as needleſs to attempt eſtabliſhing by Similitude. But if it ſhould be a Writing atteſted by three only, or one that had been written in their Preſence, but not witneſſed by them: or even a Writing that had been perfected before a Notary and two Witneſſes, but that the Notary was ſince dead; in ſuch Caſe, beſides Proof by Similitude of Hands, he ordains that the atteſting Witneſſes ſhould own their Hands; and beſides, whether they had atteſted or not, that they ſhould depoſe upon Oath, that the Writing proved by the Viewers or Skilful, had been perfected in their Preſence, and ſigned by the ſame Hand to which the Viewers had imputed it. He ordains likewiſe, that if the Notary, and ſubſcribing Witneſſes

viventem, & adnumeratorem, adveniant & illi, ſi quidem præſentes ſunt: & habeat ex collatione adimpletionum & ex teſtibus cauſa fidem. Si vero nullus horum ſit, tunc fiat quidem completionum collatio: non autem ſola hæc ad hoc ſufficiat, ſed & aliorum ſubſcribentium forte aut contrahentium ſcripturæ examinentur, ut ex plurimus comparationibus tam completionis quam ſubſcribentium forte aut etiam contrahentium una quædam colligatur, undique & efficiatur fides. Si vero nihil aliud inveniatur præter collationem inſtrumentorum: quod hactenus valuit, fiat; ut qui profert ad collationis documentum juret ſolemniter. Ut autem aliquod omnino cauſa ſumat augmentum ad majorem negotii fidem, & ipſe qui hoc petit fieri, juret quia non aliam idoneam habens fidem, ad collationem inſtrumentorum venit, nec quicquam circa eam egit aut machinatus eſt quod poſſit forte veritatem abſcondere. De quibus licebit ſeſe liberare contrahentes, ſi conſenſerint utrique ad hoc venire, ut inſinuent inſtrumenta & profiteantur ea ſub geſtis monumentorum ipſi contrahentes, quatenus preventur nequitia, & corruptione, & falſitatibus. Et quæcumque alia mala

Witneſſes be dead, their Hands ſhall be proved equally with that of the Party that had perfected the Writing. *But*, continues the Imperial Law-maker, *ſhould not the Writing in Diſpute be atteſted by ſuch a Number of Notaries and other credible Perſons as we have ordain'd, in ſuch Caſe, Proof by Similitude of Hands only ſhall never eſtabliſh it; but the Judge ſhall be obliged to exact Proof upon Oath of the Party concerned in the Eſtabliſhment of ſuch Writing, and unleſs this laſt Proof of the Reality of ſuch Writing be conformable to that by Similitude of Hands, he ſhall not regard it*; which is an evident Proof, that the Legiſlator's Intention was, that Proof by Similitude of Hands alone ſhould never have Weight to eſtabliſh any conteſted Writing whatever.

And that nothing ſhould be omitted in Confirmation of his Intention, there is this farther Diſtinction; *viz.* (3) "That if the written Contracts be of little "Moment, or perfected in the Country, theſe For-"malities are not required; but with regard to all "others, Proof by Similitude of Hands only, ſhall "never eſtabliſh them:" As if it had been ſaid, that in Matters of any Conſequence, this Sort of Proof ought never to be admitted, without other corroborating Proof.

And

mala corrigentes, præſentem promulgamus legem: iis quæ dudum a nobis in collationibus litterarum factarum, ſcripturam propriæ manus ſancita ſunt, in ſua virtute manentibus: procul dubio & in iis qui litteras neſciunt quæ olim valent in judiciis, ſuam habentibus firmitatem: quoniam quidem ex judiciali forma acceperunt examinationem hæc talia competentem. D. Nov. 73, cap. 2 & 7.

(3) Authentica, At ſi contractus. Cod. de fid. inſtrum. At ſi contractus fiat in civitate & unam libram auri exceſſerit, omnimodo adſit collationi argumentum quod libet, nec ei ſoli credatur. Argumentum id eſt Signatura & depoſitio teſtium, ut Nov. 73. ſi vero Gloſſ. ibid.

And the Text goes on: (4) *For, in ſhort, Proof by the Similitude of Hands ſeems to us extremely ſuſpicious and doubtful; we have been a thouſand Times deceived by it; and we can never rely upon it without ſome better concurring Proof.*

Such is the enacting Clauſes of this Conſtitution, whence it may be obſerved, that if *Juſtinian* did not abſolutely reject Proof by Similitude of Hands in civil Caſes, he conſidered it ſo little as to lay almoſt no ſort of Streſs upon it. For, in effect, when he ordains that it ſhall not be admitted at all, unleſs the Writing to be eſtabliſhed, be ſign'd by three Witneſſes, or by two and a Notary; or at leaſt, that there be Proof of its having been perfected in the Preſence of three (5) diſcreet and creditable Perſons, who ſhall depoſe to have ſeen it written in their Preſence, by him, whom the Viewers had pitch'd upon, by their Proof by Similitude of Hands, to have been the Writer; is not this, I ſay, tacitly owning, that this Sort of Proof was held, even in civil Caſes, in no Sort of Eſteem by the Emperor, ſince, in all Caſes, generally ſpeaking, the Depoſition of three, or even of two Witneſſes

(4) Nam falſitates & imitationes metuentes & nudis eis non credentes, &c. Nov. 73. cap. ſi tamen. Ex quo igitur plus mille falſitates, hiſce temporibus in multis cauſis, quibus accommodavimus audientiam deprehendimus. D. Nov. 73. ſecundum verſionem Gregor. Halſand. Utcunque enim falſitates & ſcriptorem imitationes vereamur neque illis ſi teſtibus deſtituti ſint fidem habeamus, &c. Neque temere ſcripturarum fidem propter prædictas cauſas, ex aliarum comparatione admittere oportet. Ibid.

(5) Teſtes advocato, quoad fieri poteſt, gravis & fide dignos non minus quam tres: ne de ſcriptura tantummodo & ejus per comparationem examinatione pendeamus, ſed nobis quum judicamus ſuppetat quoque a teſtibus auxilium. Quippe talia teſtimonia deſideramus in quibus prodeuntes teſtes dicant, ſe præſentibus ſcripſiſſe eum qui inſtrumentum conſecrat, quod que ita factum ſciant.

Witneſſes of Character and Credit, is allowed ſufficient Proof?

Hence then it is manifeſt, that Irregularity and Diſorder have crept into the Practice of our Courts of Juſtice; for, at preſent, it ſeems only neceſſary to prove a Man's Hand, by Similitude of Hands only, as it appears ſo to ſkillful Viewers, in order to condemn him to the Loſs of his Eſtate and Fortune; tho' the Practice be directly repugnant to the Senſe and even the Letter of the Law, which requires two other concurring Circumſtances, *viz. the Signature, or at leaſt, the Preſence of three creditable Perſons*; and more, *their Depoſition upon Oath.*

How comes it that we of this Age take upon us to diſpenſe with theſe Forms, or rather Requiſites? Are Forgerers leſs ingenious and frequent now, than when the Law was made? Or have we any ancient Cuſtom that authorizes the preſent Practice, or any more modern Law that warrants our diſpenſing with the ancient? No; but Rules and Forms grow obſolete, and are forgot in Proportion to their Duration: For, as Rivers receive Increaſe of impure Mixtures, the farther they run from the Source, ſo do we increaſe in Error and Male-practice in Proportion to our Diſtance from the ancient and purer Fountains of our Laws. But it is quite otherwiſe with the moſt celebrated Interpreters of the Law, who, having the Text continually before them, could not forget its Principles and Maxims, as ſoon as we, and therefore never would diſpenſe with any of theſe requiſite Formalities. Whenever they ſpeak of the (6) Similitude of Hands, they ſay, that unleſs it be ſupported by other Proof beſides

(6) Comparatio litterarum ſine teſtimoniorum confirmatione, non ſufficit ad veritatis probatione. Julian antec. ad Nov. 73. Comparatio litterarum, per quam qualis colligitur fides. Gloſſ. fin ad l. 3. Cod. de Reb. cred. Comparatio

beſides that made by ſkillful Viewers, it ought never to be admitted in the Number of Proofs. The *Comment* directly ſays, that very little or no Regard ought to be had to Similitude of Hands, being at moſt but a Motive to ground a Preſumption upon. In a Word, the moſt they dare ſay in Behalf of this Sort of Proof, was, that it might authorize a Judge to tender an Oath, regarding the Genuineneſs of the Writing, to him who would eſtabliſh it by Similitude of Hands. *Cujas* particularly expreſſes himſelf in the following Manner (7). " The Similitude of Hands " taken ſimply and nakedly, is no Proof; the moſt " that can be ſaid in its Favour is, that it may paſs " for a *Half-Proof*; that is to ſay, that it might be " an Inducement to the Judge to tender the Oath to " the Perſon who would eſtabliſh the Writing by this " Sort of Proof. But in order to ſtrengthen it to a " Proof, the Depoſitions of the Viewers ſhould be " ſupported by the Signature of Witneſſes and their " Depoſition upon Oath.

An infinite Number of Civilians, whoſe Names I omit as unneceſſary, have been of the ſame Opinion: and

paratio ſola non probat jure authenticorum. Gloſſ. in verbo teſtium. Nov. de inſtrum. caut & fide, 73. Comparatio ſola litterarum non probat, quia litteræ poſſunt variari. Gloſſ. in verbo faciamus ad l. comparationes. Cod. de fide inſtrum. Non creditur ſoli comparationi ſine alio argumento: id eſt ſine depoſitione trium teſtium deponentium quod viderunt eam preſcribi. Paul. de Caſt. ad Rubr. Auth. at ſi contractus.

(7) Scripturæ nudæ licet comparatione litterarum confirmetur, plenam fidem non eſſe. Judicem tamen ea moveri poſſe ad deferendum jusjurandum, id eſt probationem facere ſemi plenam: eam quæ teſtes habet ſubſcriptos, probationem facere plenam. Cuja ad Nov. 73. Item ad Titul. Cod. de fide inſtrumentorum. —— Addendum eſt Chirographum ſuper quo controverſia eſt & quod reus a ſe ſcriptum negat, ne tunc quidem probare, quando ex alia ſcriptura trium

and many of them of extremely delicate in regard to Proof by Similitude of Hands, even tho' it ſhould be attended with all the Formalities required by the aforeſaid Novel or Conſtitution (8). " For, ſays *Mornac*, what can be more uncertain " than that, concerning which, one may be deceived " by ſo many different Means? Wherefore, added " he, we ſee that all prudent Magiſtrates, have al- " ways been extremely tender and circumſpect in " giving Faith to Proofs grounded on the Similitude " of Hands, chuſing rather to found their Decrees " on other Circumſtances, than on this, ſo ſubject to " Error and Deception, even tho' certified by the " moſt ſkilful in the Art of Writing.

(9) *Menochius*

um teſtium ſubſcriptionem habente comparatio facta eſt; niſi chirographum illud cujus fides quæritur ex comparatione alterius ſcripturæ trium teſtium ſubſcriptionem habentis, etiam a tribus fide dignis teſtibus ſubſcriptum fuerit. Conrad. Ritherſus in expo. Method. Nov. part. 9. cap. 25. Et niſi teſtes propriæ ſubſcriptioni atteſtentur quod eis præſentibus facta eſt charta. Gloſſ. final. auth. at ſi, Cod, de fide inſtrumentorum.

Et quod valeat tantum ad deferendum jusjurandum ſola litterarum comparatio tenent Barbos. ad l. admonendi de jurejurando. N. 26. Art. Conſ. 64. Felin. cap. 2. n. 14. Cod. de fide inſtrum. Alexand. Conſ. 76. n. 3. l. 3. Conſ. 80. l. 4. n. 4. & Conſ. 150. n. 16. l. 5. Bertrand. Conſ. 140. l. 2. Curt. Sen. Dict. l. admonendi. n. 115, & 117. Ruin. Conſ. 35. n. 8. Rol. a Val. Conſ. 26. n. 12 & 13. l. 1. *&c.*

(8) Nihil enim fallacius, cum ætas, valetudo, temporiſque opportunitas, aut difficultas naturale ſcriptionum cauſam mutare ſoleat. Indeque etiam numquam boni cautique judices indicias ex incertis illis indiciis dicunt, &c. Denique compertum habemus plus ſatis, ſuſpecta eſſe adeo judicibus ea comparationum judicia, ut fere inſuper habeant, liteſque aliunde ex inſtrumentis judicialibus perpenſaque perſonarum exiſtimatione dirimant. *Mornac.* ad l. comparationes Cod. de fide inſtrument.

(9) *Menochius*, who may be ſaid to have treated this Subject more amply and learnedly than any other, having wrote an intire Chapter, wherein he examines all the Caſes and Queſtions that can poſſibly relate to Proof by Similitude of Hands in civil Matters, ſays peremptorily, that it is too aſſuming for any Man to aſſert, that it does alway amount to a Half-Proof, tho' ſupported by no more corroborating Circumſtances than the Depoſition of Viewers. "All, "ſays he, unanimouſly agree, that all Proof by Si- "militude of Hands never amounts to a full Proof; "and there are but few who ſay, that it comes up "to even a Half-Proof: And theſe are not to be cre- "dited; for there is not one of all thoſe Texts they "quote from the Law in Support of their Opinion, "but makes rather againſt than for them (1). The "Law, it is true, ſays, that the Opinion of ſkilful "Viewers ought not to be intirely ſlighted, any more "than

(9) Comparatio litterarum plene probat quando conſtat de ſimilitudine, & in illa apocha ſuper qua eſt contraverſia, adeſt ſubſcriptio trium teſtium qui graves & honeſti ſunt, & illi recognoſcunt ſuas ſubſcriptiones, affirmantes ſcripturam factam fuiſſe ipſis præſentibus ab illo inſcriptura commemoratio. Quando autem apocha non habet trium teſtium ſubſcriptionem, ſed ex ſola litterarum comparatione apparet litterarum ſimilitudo, certum eſt, & omnes conſentiunt, quod plene non probat. Quidam autem dicunt, quod ſemiplene: Sed ego dico hoc eſſe in judiciis arbitrio. Nam textus quo Doctores moventur non affirmat comparationem hanc ſemiplenam probationem facere; ſed ſolum ait quod non eſt penitus rejicienda. *Menoch.* l. 2. Caſ. 114. de arbit. judic.

(1) Litterarum examinatione penitus non repulſa, ſed ſola non ſufficiente augmento autem teſtium confirmanda. Tex. Nov. 73. cap. 2. Negare tamen non poſſumus quod experientia docet, probationem hanc eſſe multum periculaſam, cum multi reperiantur qui alterius manum ita fingunt, ut illam ipſam ſcripturam eſſe dicamus. *Menoch.* ibid.

" than the Similititude of Hands; but where does " it ſay, that all that can be collected by theſe Means " ſhall amount to a Half-Proof? But, continues the " ſame Author, it can't be denied upon the whole; " that this Sort of Proof is in its Nature extremely " perilous and uncertain; every Day's Experience " confirms this Truth. How many have been known " ſo ingenious in the Art of Imitation, that it was " impoſſible to diſtinguiſh the leaſt Variation in their " Counterfeits of the Hands of others?

(2) Some others go yet farther, maintaining that the ſimple Opinion or Proof of Viewers does not amount to even a ſlight Preſumption, being, according to them, but Fume and Vapour.

But, to conclude this firſt Point, there is no doubt, that all the learned in the Law agree *(3)*, that this ſort of Proof is at beſt extremely doubtful and precarious; and that even in civil Caſes, it never ought to be conſidered of any Weight, unleſs it be corroborated by other concurring Circumſtances beſides the Opinion of Viewers and Similitude or Diſſimilitude of Hands.

(2) Covaruvias 3. loco & modern. Pariſ. in conſuet. Pariſ. prout refert Pantſchman. d. qu. 2. n. 33. tenent quod nec præſumptio quidem inde oriatur id quod etiam ſenſiſſe videtur Dom. Cavalc. dec. 27. n. 62. Dum tradit quod dicta comparatio facit dumtaxat fumum. Nic. Genova. Patav. de Script. priv. l. 2. n. 70. pag. 83.

(3) Burſal. Conſ. 123. n. 21. Pet. Sard. Conſ. 187. n. 24. in 2 Hip. Rimin. Conſ. 39. n. 6. Pet. Aug. Morlac. in ſuo Empor. l. 1. Tit. de fid. inſt. quæſt. 3. n. 21. verſic. ſed tamen ſciendum. Marc. decis. 935. Maſcard. concl. 330. n. 7. Joan. Koppen. decis. 46. n. 21. Pet. Gliken. in l. inſtrumenta n. 13. Cod. de Prob. proſp. Farinac. in frag. civil. part. 1. n. 495.

PART II.

Of Proof by Similitude of Hands in Criminal Caſes.

WE come now to the ſecond Part of our Subject which is of far greater Importance than the firſt, as Life, Liberty, and Reputation, are of much more Conſequence to Man than the Goods of Fortune. And the better to ſound the Depths of Truth, and find it, we will examine what has or may be ſaid for or againſt this Sort of Proof by Similitude of Hands.

The Advocates for this kind of Proof in Criminal Matters, firſt lay it down for a Principle that Cuſtom has eſtabliſhed it in civil Caſes; and thence conclude that it ought to be admitted likewiſe in criminal Matters; becauſe, ſay they, in Matter of Proof, there ſhould be no Diſtinction between civil and criminal Caſes; Proof being nothing elſe but the Means of diſcovering Truth. This Means, they add, is either doubtful or certain: if doubtful, it is no Proof in either Caſe; but if certain, it is one in both: Whence, they ſay, it follows, that Cuſtom having eſtabliſhed this ſort of Proof in civil, it ought likewiſe to be received in criminal Caſes.

They lay great Streſs upon Cuſtom, being warranted, they think, by ſeeing this kind of Proof admitted indifferently in all manner of criminal Matters. Beſides, that in certain Caſes, ſuch as Forgery, this ſort

ſort of Proof is of abſolute Neceſſity. Here, they ſay, it is extremely difficult to come at the Truth, and not at all without the Admiſſion of this ſort of Proof, as the Guilt lies in the Falſification of Hands (4). It was, they add, in Conſequenc of this Neceſſity that the Emperor *Conſtantine* admitted it, by an expreſs Conſtitution, which is reported in the *Theodoſian* Code, and inſerted in that of *Juſtinian*, under the Title of of the *Cornelian* Law relating to the Guilt and Puniſhment of Forgerers. In Matters of Forgery, they ſay, this ſort of Proof muſt neceſſarily be admitted, even tho' it ſhould be excluded in others, becauſe of the Difficulty of procuring any Proof whatever by Witneſſes; that this Difficulty has often obliged Magiſtrates, in many Caſes, to have Recourſe to more imperfect Proof than even that by Similitude of Hands; and that this, probably, was the Reaſon why in Caſes of Adultery, Proof by means of bitter Waters was eſtabliſhed by the (5) *Moſaical* Law; all poſitive Proof being morally impoſſible to prove a Crime, which is ſecret in its Nature, and ſcarce ever committed in the Preſence of any but the guilty themſelves.

They go yet further, and maintain that this kind of Proof ſeems to include in it the Qualities of all other kinds of Proof whatever. It has, firſt, they ſay, all the Requiſites of Title or Form of a Proof, being founded on a written Deed or Inſtrument; ſecondly, it is a Proof by living Witneſſes, becauſe the Viewers appointed to make the Compariſon, may be deem'd ſuch; and laſtly, it includes the Requiſite of Preſumption or Suppoſition, becauſe there cannot be a ſtronger than that which ariſes from the Similitude or Diſſimilitude of Hands, as by the ordinary Laws

(4) D. l. ubi 2. Cod. Theod. & 22. Cod. Juſtin. ad l. Cornel. de falſ.

(5) Numb. cap. 5.

Laws of Nature the ſame Cauſes produce the ſame Effects. In ſhort, ſay they, if Proof by Similitude of Hands is not allowed to have the Force of a full Proof in criminal Caſes, there is, however, no denying that it ſhould have all the Efficacy of a Half-Proof, which all the Civilians impute to it in civil Matters.

I have here, I think, produced an Abridgment of what may be ſaid moſt material in Support of Proof by Similitude of Hands: we will now examine what may be ſaid on the other Side of the Queſtion. And firſt, we muſt at once cut off all Support ariſing from Cuſtom, in regard to this Sort of Proof's being admitted in civil Matters, and being authorized by the Decrees of our Courts of Juſtice even in criminal Caſes.

As for all Authority ariſing from Cuſtom, which had introduced the Admiſſion of this ſort of Proof in civil Matters, we have ſhewn before, this Admiſſion to be repugnant to the Letter as well as Intent of the Law: Therefore, ſuppoſing that ſome Magiſtrates had gain'd upon themſelves to diſpenſe with the ſtrict Injunctions of the Law in civil Caſes, there is no doubt that they ought not to ſhew the ſame Facility in criminal Matters, in as much as it is univerſally allowed, that all legal Indulgence in favour of an accuſed Perſon ſhould be ſtrictly adhered to, and never departed from (6). "It is not, ſaid a learned Wri-
"ter,

(6) Oportet, ut qui judicis officio fungitur tanquam Index, hoc eſt per aliorum teſtimonium cognoſcat crimen, quod in publico Judex punire debeti de hac ſola cognitione quam per teſtium relationem habet judex, intelligitur quod ait Salomon: Qui quod novit loquitur judex juſtitiæ eſt, poſtquam crimen fuerit judici juxta juris ordinem relatum & plene cognitum. Alphonſ. a Caſtro de poteſt. leg. pænal. l. 2. cap. 15. in 1. notab. —— Non eſt ſatis ad pænam infligendam

" ter, enough for a Judge to know how to condemn, " but his Condemnations ſhould be attended with all " the neceſſary Formalities. Judges are not at Li- " berty to admit that for an undoubted Proof of the " Truth, which the Law commands them to regard " only as a doubtful Conjecture.

(7) Beſides, in Matter of Proof, there ought never to be any Conſequence drawn, with regard to criminal Caſes, from any Cuſtom or Maxim obſerved in relation to civil Matters. For, as the Life of Man, which is the Object of criminal Proſecutions, is infinitely of greater Importance than the Goods of Fortune, which can only be affected by Decrees in civil Litigations, it would be inexcuſable Imprudence in a Magiſtrate not to be more cautious and circumſpect in his Determinations of the firſt, than of the latter.

A Magiſtrate who would act with Prudence, and judge with Impartiality, ought to follow the Example of the ſkilful Phyſician, who, in acute Diſtempers, is infinitely more circumſpect, than in Diſeaſes leſs immediately dangerous. In the firſt Caſe, he conſults Prognoſtics and Symptoms, and examines narrowly every Circumſtance that can guide him to the true Knowledge of the Diſtemper; whereas in the ſecond, he contents himſelf with ſlightly examining the Motions

fligendam quam judex ſciat, ſed ut juris ordine ſciat. ibid. conclu. 1.

(7) Hæc omnia in pecuniariis quæſtionibus intelligentes. In criminalibus enim in quibus de magnis eſt periculum, omnibus modis, &c. Novel. 90. cap. & quoniam. ——— Cunctator eſſe debet qui judicat de ſalute. Alia ſententia poteſt corrigi, de vita tranſactum non patitur immutari. Caſſio d. Ep. 1. l. 7. in form. com. prov. De vita & ſpiritu hominis qui pars mundi eſt, & animatium numerum complet. Laturum ſententiam diu multumque curctari oportet, nec præcipiti ſtudio, ubi irrevocabile factum eſt agitari. Ammian. Marcel. l. 29.

tions of the Eyes and Features of the Face, and feeling the Pulſe. In like manner ought a Judge to be more nice and circumſpect in hearing and determining capital Caſes, than where only private Property is concerned. In the latter, he may be allowed to decree according to Circumſtances and Appearances, when poſitive Proof is wanting, but he is by no means at Liberty to act in the ſame manner in regard to criminal Caſes. Here, he is obliged to ſeek and penetrate Truth to the Bottom; in order to which, 'tis incumbent upon him to weigh every Circumſtance, and examine every Symptom and Sign with the utmoſt Attention, not venturing to determine but upon undoubted Circumſtances or Signs, and poſitive Proof.

It is evident that the greateſt of the Legiſlators were of this Opinion (8): For a ſimple Avowal or Confeſſion of a Party, which, by the Law, is deem'd a full conviction of him in civil Caſes, is allowed no ſufficient Proof in criminal Matters; nor even his Oath, which is ample Evidence againſt him in civil Matters, ſhall not, by the Law, be deem'd a Foundation ſufficient to build the ſlighteſt Preſumption upon in Diſfavour of one accuſed criminally (9). And hence, without doubt, it is that the Law permits, that in civil Caſes Proof may be made in the Preſence of, and Witneſſes may be examined by Commiſſioners appointed by the Court, but in criminal Caſes

(8) Confeſſos in jure pro indicatis haberi oportet, quare ſine cauſa deſideras recedi a confeſſione tua cum ſolvere cogeris l. unic. Cod. de confeſſio. Confeſſiones reorum pro exploratis facionorbus haberi non oportet. L. 1. ff. de quæſt. Sec. Divus. Non ſtatim confeſſo reo contenti eſtis ad pronunciandum, &c. Tertul. in Apologet. L. 2. ff. de jurejur. & tot. tit.

(9) L. judices Cod. de teſtib. ſed hoc in civilibus tantummodo cauſis. Nam in criminalibus teſtes apud judices repræſentandi ſunt. Authent. Apud Cod. eod.

Caſes the ſame Law admits of no ſuch diſtant Examination: the Judge being obliged to ſee, hear and examine the whole Proceeding perſonally; and there is no queſtion that the Practice of decreeing in civil Caſes on Depoſition only, is founded on this Maxim; whereas in criminal Proſecutions, Depoſitions have no ſort of Influence or Weight, unleſs the Deponents be immediately preſent to be confronted and croſs-examined.

I am ſenſible that the Law ſupports, and even favours, not only all Inquiries for the Detection of Crimes, but the Puniſhment of them; but the Protection of Innocence is infinitely more favoured, as being of far greater Conſequence (1). *It is much more equitable*, according to the ſtated Maxims of the Law, *or rather far leſs unjuſt to abſolve a Criminal, than condemn an innocent Perſon.* Wherefore the upright Obſervers of the Law never precipitate their Judgments in criminal Caſes, as ſome do, and may leſs criminally, in civil Matters. In the firſt, they are tied down by the Law to the utmoſt Circumſpection; nay, they are bound by the Law of Nature, and the Dictates of Conſcience to be ſcrupulouſly circumſpect, where the Life of a Fellow-Creature is at Stake. But where private Property only is concerned, tho' a Judge be obliged to ſeek Information of the Truth aſſiduouſly, yet however is not the Danger of committing Injuſtice, nor the Injury of an erroneous Sentence ſo great in one Caſe as the other.

For theſe Reaſons, we muſt totally exclude from this Queſtion all Arguments deduced from the Practice or Cuſtom of admitting Proof by Similitude of Hands in civil Caſes; and from the ſame Motives, all Advantage derived from the Sanction of Decrees even

(1) Satius eſt impunitum relinqui facinus nocentis, quam innocentem damnare. L. 5. ff. de Pænit.

in criminal Caſes, ought to be intirely excluded likewiſe. It is true, that this ſort of Proof has been often admitted in the inferior Courts; but it is likewiſe certain, that the Parliament of *Paris* (the ſupreme Court of Judicature in *France*) has never yet adjudged it ſufficient to found a Sentence of Condemnation upon in capital Caſes.

Proof by Similitude of Hands in criminal Caſes, has been admitted by the Parliament as one of a thouſand other Means uſually taken, for coming at Truth. Are not, for this ſalutary End, the moſt diſreputable Perſons often ſworn and examined? Are not the ſlighteſt and minuteſt Circumſtances, and even the moſt foreign often heard and conſidered? But it does not follow, that any wiſe and upright Judge would or ought to look upon ſuch ſhadowy Proofs, as Lights by which he might ſafely ground his Decrees. On the contrary, we may ſay, that in a Multitude of important and remarkable Inſtances, that ſupreme Court has made little or no Account of Proof by Similitude of Hands, in criminal Caſes, where there was no other of a more poſitive and clearer Nature.

Theſe firſt Objections, made by the Advocates for this kind of Proof, being anſwered, or rather retrenched as wholly unteneable, the Queſtion will be then ſimply what it ought to appear to be, without Prejudice or Partiality. We will therefore examine it by its true and natural Principles: and of theſe, I beg Leave to eſtabliſh three principal, which I ſhall diſtinguiſh into as many different Propoſitions.

The firſt is, that, generally ſpeaking, we have no Law which authorizes the Admiſſion of Proof by Similitude of Hands, in criminal Caſes.

The ſecond, that the Law admits but of three Sorts of Proof in criminal Matters.

And

And the third, that Proof by Similitude of Hands is none of thoſe Proofs admitted by the Law.

Theſe Propoſitions being once eſtabliſhed, the natural Concluſion will be eaſily deduced; and all objections will as eaſily be anſwered.

The Eſtabliſhment of my firſt Propoſition, *viz.* that there is no Law which admits of Proof by Similitude of Hands, in criminal Matters, will be a Point of no great Difficulty: For to begin with the Divine Law, which ſhould be the Baſis of all Laws, we find it far from admitting this Sort of Proof in capital Offences, expreſly prohibiting the Reception of it. (2) *No Man*, ſays the Lord, *ſhall be condemned to die, but on the Teſtimony of three, or, at leaſt, of two Witneſſes:* And he reiterates this Precept three times, as being one of the moſt important of all the old Law.

Let it not be ſuppoſed that the foregoing is one of thoſe Precepts that has been either amended or neglected by the Law of Grace, as conſiſting only of Forms and Ceremonies: It is not; for he who came to accompliſh and perfect the Law, was incapable of altering or abrogating a Precept, without which his new Law muſt have been imperfect (3). We find *Chriſt*, on the contrary, endeavouring to enforce and eſtabliſh it a new; and this he does oftner in his Law than had been done in that of *Moſes*.

If we paſs from the Law of God to thoſe eſtabliſhed by Man, we ſhall find none that admits ſo weak a Proof as that by Similitude of Hands, in criminal Caſes. There is nothing of the kind to be met with

(2) Homicida ſub teſtibus punietur, Exod. 35. 50. Deut. 17. 6. &c. 19. 15.

(3) Accuſationem non recipere niſi ſub tribus vel duobus teſtibus. Matth. 18. 16. 2 Cor. 13. 10. 1 Tim. 5. 19. Heb. 10. 28.

in all that remain to us of the Laws of old *Greece*. There are no Traces of any Thing of the kind to be found in the particular Laws of any other Country. And I moſt carefully examined all the Texts of the *Roman* Laws that treat of the Similitude of Hands, but met with none that ſhould induce any Man of Integrity to ſuppoſe it had ever been intended, much leſs ordained, that this ſort of Proof ſhould be received in Trials for capital Offences. There is, 'tis true, (4) one made by the Emperor *Conſtantine*, which ſeems to admit of it in Caſes of Forgery: but I ſhall ſhew, in its due Place, that it was intended rather in Favour than Diſfavour of the Perſon accuſed of this Crime: And that this Law, far from authorizing the concluding that this ſort of Proof ſhould be admitted in Diſfavour of a Criminal, concludes quite otherwiſe and expreſly, that it ſhould never be received as ſufficient, in criminal Matters.

As for thoſe three Conſtitutions of *Juſtinian* which I have cited, there is no Difficulty in proving that none of them are applicable to criminal Proſecutions. The 73d is that which regards moſt this ſort of Proof: It is an Amendment of the two former Conſtitutions; it is explanatory of them; in a Word, it contains them both: And for this Reaſon, it is in this only that we are to ſeek the Intention and Spirit of the Law.

Now, in this ample Conſtitution there is ſcarce a ſingle Word that does not ſhew it to have been intended and calculated for the Deciſion of civil Caſes only. Wherever any Caſes or Inſtances are ſuppos'd in it, they are conſtantly relative (5) to Contracts of Exchange or Truck, of Depoſits of Loans, or to Con-

(4) D. l. Ubi ad l. Corn. de falſ. Cod.

(5) Oblato namque commutationis documento. Præfat. de Nov. 73. Etinim quiddam de depoſito. Ibid. Si quis vul-

tracts of the like Nature. Wherever Mention is made of Parties, they are alway named Contracters, which ſhews the Deſign of the Law. In a Word, the Intention of this Conſtitution is ſo viſible, and its Order and Diſpoſition ſo evidently calculated to anſwer the Intention, that it is morally impoſſible to underſtand it, but as relative to civil Matters only. For Inſtance, can we poſſibly apply to criminal Caſes, that Part of this Law, where, after deſcribing the Forms and Solemnities to be obſerved concerning the Writing or Inſtrument to be proved, it adds; *And ſhould theſe Formalities be wanting, Proof of the Similitude of Hands by ſkilful Viewers, ſhall ſerve only to oblige the Judge to avail himſelf of the Depoſition, upon Oath, of the Party who would eſtabliſh the diſputed Writing.* But was it ever known, that the deciſive Oath of the Party intereſted was admitted as Proof, or regarded in criminal Caſes?

And further, where this ſame Law ordains, that among the Witneſſes to be examined upon Oath (6), he who had counted the Money advanced, ſhould always be moſt credited, it is a clear Evidence, that there was no Intent of riſking Things ſo precious as Life, Liberty, or Reputation, on ſuch weak and frivolous Proof as that by Similitude of Hands. All the Commentators on this Law, and particularly *Julien* and *Accurſius*

vult caute deponere, &c. cap. 1. ibid. Sed & ſi quis aut muti, &c. cap. 2. Si tamen quiſquam aut deponens aut mutuans, aut aliter contrahes, &c. cap. 4. Quod ſi etiam adnumeratorem habuit inſtrumentum, &c. Aut etiam contrahentium una coligatur, &c. Sec. 2. ibid. Et profiteantur ea ſub geſtis monumentorum contrahentes. Sec. 3. ibid. &c.

(6) Cæterum, ſi Tabellio mortuus ſit & abſoluti inſtrumenti teſtimonium habeatur ex alterius comparatione ſi quidem ſuperſtitem habeat eum qui inſtrumentum conſcripſit illius mandato, & item numeratorem prodeunto & illi. d. Nov. 73. ex intepr. Halvand.

Accurſius are clearly of Opinion, that it is relative to civil Matters only, wherever this Sort of Proof is mentioned.

Having ſpoken of a Law made by *Conſtantine*, where this kind of Proof ſeems to be admitted in Caſes of Forgery; Let me add, that even this Admiſſion is a tacit Proof that it was not extended to other capital Offences. I ſhall hereafter point out the true Deſign of this Law, and the Reaſons for admitting Proof by Similitude of Hands in Caſes of Forgery; but I may be allowed to ſay here, that whatever might have been the Reaſons for admitting that Sort of Proof in Caſes of Forgery, by that Law, it is plain from the Admiſſion of it in that particular Inſtance, that it was admitted in no other criminal Caſes whatever.

It ſhould be obſerved all along in conſidering this Subject, that no Mention is made of this Sort of Proof, but three times, in all the *Roman* Laws; and that not one of theſe Texts can be conſtrued to be applicable or relative to criminal Caſes. And no wonder that the *Romans* have been ſilent on this Point, it having been, both among them and the *Greeks*, very rare to have Recourſe to written Proof of any kind in criminal Proſecutions. *Demoſthenes*, *Cicero*, and his Commentator *Aſconius*, mention ſome Inſtances where written Proof had been admitted; but they are wholly ſilent, as to Proof by Similitude of Hands, in caſe the Party accuſed ſhould deny his Hand-writing: So are *Ariſtotle* and *Quintilian*, who together with *Tully*, have minutely deſcribed all the different kinds of Proof practis'd in their Days in Proſecutions for capital Offences. Whence, I conceive, it may be ſafely concluded that this Sort of Proof was not practic'd in thoſe earlier and purer Times, on account of its viſible Uncertainty.

If,

If, in thoſe earlier Days, the Party accuſed own'd the Writing produced againſt him, it was admitted as Proof; but if denied, it was deemed none, unleſs there were creditable Witneſſes to ſwear they had ſeen him write the ſame, or at leaſt that they had found it upon him, or in his Cuſtody. Writing thus circumſtanced might juſtly be admitted as Proof in any Caſe: but there is not a ſingle Inſtance in all Antiquity, nor even an Inſinuation, that the Teſtimony of Viewers, from the bare Similitude of Hands, had been received as Proof in criminal Caſes.

Have we any Statutes that admit this ſo uncertain a Proof, which is not admitted by the civil Law; and which the Law of God abſolutely rejects? There are certainly none. But I find, on the contrary, that ſuch of our Ordinances as treat of this ſort of Proof, diſtinguiſh very preciſely and accurately between civil and criminal Caſes. Where they treat of Proof by Deed or Writing in civil Matters, it is ordained that it ſhall be by Verification, a general Term comprehending Proof by Deeds, by Witneſſes, or by Similitude of Hands on the Teſtimony of ſkilful Viewers. But where they treat of Proof by Deed or Writing in criminal Caſes, they ordain, not that it ſhall be by Verification, as in civil Caſes, but by Information, a Term ſignifying Proof by living Teſtimony. For Example, in the Ordinance of *Orleans* (7), it is ſaid, *All Bills, Bonds and Notes paſſed between Merchants, but no other, ſhall intitle the Bearer to his Action, provided they are owned by the Drawer, or verified*, &c. It is obſervable, that the Term *verified* is here made uſe of as the Matter treated of is purely civil. Again (8), *They who deny their Hand ſet to any Bond or Note, ſhall forfeit double the Sum ſued for, after Verification*

(7) Art. 145.
(8) Charles IX. at Paris in 1563.

fication has been made to the contrary, &c. Here again, the Term *Verification* is uſed, becauſe relative to civil Matters only.

But in treating of criminal Matters, our Ordinances are quite different. Here, the Word *Verification* is never uſed (9). *No Man ſhall deny his Hand Writing on Pretence of its being forged, unleſs he undertakes to prove the Forgery, and proceeds to Proof in three Days after, which Proof being declared admiſſible by the Court, he may proceed by* Information *againſt the ſuppoſed* Forgerer *or Criminal, and againſt the Notary or others concerned, by citing them to appear, and even by ſecuring their Perſons.*

It is obviouſly perceivable here, and throughout all our Ordinances, that criminal and civil Matters are diſtinguiſhed. In the latter, ſimple *Verification* is admitted; but in criminal Caſes, all Proof ſhall be by *Information*, a Term which has no manner of Relation to the Teſtimony of Viewers in the Compariſon or Similitude of Hands. And tho' lately the Practice of admitting the Teſtimony of theſe Viewers in Suits carried on by way of Information, (a Novelty unwarrantable and without Example) has been countenanced equally with Proof by Witneſſes, yet is it certain, as ſhall be manifeſted hereafter, that Viewers are no Witneſſes, nor ought to be deem'd ſuch, and that the Term *Information* implies not the Reception of Viewers on the Foot of Witneſſes. This is ſo true, that tho' an Arret or Decree allows a Party to proceed againſt another by *Information*, it is well known that he ſhall not therefore be at Liberty to have Recourſe to Proof by Similitude of Hands, if he be not expreſly authorized by the ſame Arret, or ſome other.

I may

(9) Francis I. A ys ſur Thille en Octobre 1535. cap. 5. Art. 23. & cap. 9. Art. 10. & Henry III. en 1585.

I may be allowed then to ſay, that my firſt Propoſition is true, *viz. That we have no Law whatever which authorizes the Reception of Proof by Similitude of Hands in criminal Caſes.* We will now proceed to the ſecond, which is, *that the Law admits but of three Sorts or Species of Proof in criminal Matters.*

This Propoſition may be much more eaſily eſtabliſhed than the firſt; for being founded in, and ſupported by the very Law itſelf, there needs no more than quoting ſuch Texts of the Law as relate to the Subject (1). *Be it known*, ſaid the Imperial Lawmaker, *that no Man ſhall be admitted to proſecute another capitally, unleſs he can prove the Crime by unconteſted written Proof, by the Teſtimony of irreproachable living Witneſſes, or by preſumptive Evidence, undoubted and clearer than the Day.*

Though nothing can be clearer than this Text, yet as I ſhall have Occaſion in illuſtrating this Propoſition, to ſhew that Proof by Similitude of Hands, is none of thoſe intended, much leſs mentioned in the foregoing Text, it may not be unneceſſary, before we go further, to beſtow a curſory Examination on theſe Proofs ſeparately; becauſe how different ſoever they be, they are but too often confounded and miſunderſtood, even by thoſe who ought to know better. One would wonder how any of the Profeſſion could confound together, or miſtake Things ſo different and diſtinct, as Proofs, by Title or Deed, by Witneſs, and by Preſumption; and yet we know but too truly, that ſuch Miſtakes are committed daily.

I ſay then, that in criminal Proſecutions there are three Sorts of Proof admitted, *viz.* Proof by incon-

 teſtible

(1) Sciant cuncti accuſatores eam ſe rem deferre in publicam notionem debere, quæ inſtructa ſit apertiſſimis documentis, vel munita idoneis teſtibus, vel indiciis ad probationem indubitatis & luce clarioribus expedita. L. fin. Cod. e Probat.

teſtible Title or Writing, by irreproachable Witneſſes, or by Preſumptions clear and evident as the Day. Theſe are termed by Civilians, literal Proof, Teſtimonial Proof, and conjectural Proof (2). Literal Proof is that which proves by the immediate Authority of ſome authentic Writing, the Fact or Thing neceſſary to be eſtabliſhed. Therefore, in order to form a compleat literal Proof, two Conditions among many others, are abſolutely and neceſſarily eſſential. The firſt, that the Inſtrument or Writing produced, contain ſpecifically, and prove immediately the Fact or Crime alledged; for Inſtance, if the Proſecution be for Slander, that it contains preciſely Words amounting to Slander; and if for a Conſpiracy, that it preciſely contains Words amounting to and proving a Conſpiracy: and ſo in Proſecutions for Treaſon, and all other Crimes. For if the Title or Writing produced contains not preciſely Words amounting directly to the Crime alledged, but only Words whence conjectural Conſequences may be deduced, then ſuch Proof cannot be called a literal Proof of the Crime, but rather a literal Proof of a Conjecture; and by Conſequence, ſuch Proof can be deem'd at beſt but a conjectural or preſumptive Proof.

The ſecond Condition required in a literal Proof, is, that the Title or Writing produced proves itſelf by its own Weight and Authority; for without this Quality, it can be no literal Proof, ſince it requires other Aids to ſupport it. When therefore any ſuch Writing ſubſiſts not by its own proper Authority, without the Teſtimony of Witneſſes, or that of preſumptive Evidence, it is no longer a literal, but rather a teſtimonial or conjectural Proof. To form a legal teſtimo-

(2) Inſtrumentum nil aliud probat, quam illud quod continetur in eo. Bal. ad L. Ad probationem Cod. de Probat.

teſtimonial Proof, there are likewiſe two Conditions eſſentially neceſſary.

The firſt is, that the Witneſſes admitted, make Oath poſitively and preciſely of the Crime or Fact attempted to be eſtabliſhed. For ſhould they not depoſe immediately concerning the Fact in queſtion, but of others, whence Conjectures or Preſumptions may be formed; ſhould not they depoſe but as to Circumſtances either preceding or ſubſequent to the Commiſſion of the Crime alledged, even tho' from ſuch Circumſtances Conſequences might be deduced ſo ſtrong and concluſive as to found a Sentence of Condemnation upon; yet, I ſay, notwithſtanding the Force of ſuch Teſtimony, it ſhall not come up to Proof teſtimonial, becauſe it has not the Nature or Requiſites of it: and can at moſt be accounted but of the Number of conjectural Proofs, becauſe the Depoſition of the Witneſſes amount to no more than Preſumptions.

The ſecond Condition eſſential to Proof teſtimonial, is, that the Witneſs ſwear poſitively to the Commiſſion of the Fact (3), as a Matter of Certainty that he had actually ſeen, or at leaſt heard, if it ſhould be of ſuch as conſiſt in Words, as Slanders, Blaſphemies, &c. For ſhould the Witneſs depoſe only (4) by Hearſay, tho' it ſhould be of the moſt credible Perſon in the World; ſhould his Knowledge appear the leaſt doubtful or uncertain; ſhould his Evidence a-

 mount

(3) Deponat ſub præſentia ſua debitum eſſe ſolutum L. Teſtium 14. Cod. de teſtib. Licentia ſit quærere per examinationem teſtium dicentium ſe, & affuiſſe iis quæ geſta ſunt, & videſſe quæ tunc agebantur. Auth. de ſanctiſ. Epiſcop. cap. 2. Sect. Si vero abſunt.

(4) Sic ergo de ſua ſcientia debet reddere teſtimonium & de ſua præſentia. De auditu autem alieno non valet. Gloſſ. ad d. l. teſtium in verb. præſto.

mount to no more than Belief or (5) Opinion, founded on ſome Circumſtances and Conſequences of his own deducing; ſhould not, in fine, the Witneſs ſwear to what he himſelf had either ſeen or heard, his Evidence cannot come up to Proof teſtimonial, becauſe Hearſay amounts to ſimple Conjecture only, which neceſſarily implies Uncertainty compoſed of Doubt. Conjecture and Belief are ſynonimous, and form but a ſimple Opinion, which, in a Word, can never come up, nor ought never to be deemed Teſtimonial Proof.

Theſe Maxims are deduced from the pureſt and conſtant Conſtruction and Diſpoſition of the Texts of the Civil Law; and they are likewiſe eſtabliſhed by the (6) *Attick* Law, as may be ſeen in very few Words, by a Paſſage in a late Collection of *Attick* Laws,

(5) Et ideo teſtis qui adverſus fidem ſuæ teſtationis vacillant audiendi non ſunt L. 2. ff. de teſtib.---Teſtis debet dicere de veritate, non autem quod credat tantum. Gloſ. & propoſitis. Sect. Nulli autem. In authent. de ſanctiſſ. Epiſcop.

N. B. Il y en a un texte merveilleux de du Moulin au Nombre 63. ſus le Sect. 5. de la Novelle Conſt. Gloſſ. Denombr. ou il dit, que quand quatre Notaires auroient collatione une Copie ſur un Original, & qu'ils y ajouteroient qu'il ſcavant que c'eſt le vrai Original, pour l'avoir bien vu & examine, toutefois leur Copie ne feroit pas pleine foi ſans la preſentation de l'original. Car, dit il, des temoins ou notaires ne peuvent depoſer que de ce qu'ils voyent, parce, dit il, qu'ils n'ont pas vu faire l'original. Cela eſtant ils n'en peuvent pas avoir une certitude qui vienne de leur propre ſens, & cela eſt impoſſible, *cum actus tranſierit, vid. p.* 333. il eſt vrai qu'un peu apres il dit que, *faceret ſemiplenam probationem, cum magno periculo.* 68. De plus qu'il en ſeroit autrement, ſi c'etoient des copies qu'ils euſſent examinees apres avoir prete ſerment devant le juge 67.

( ) Α αὖ ἐὰ δῆ τις, χ᾽ οις ἂν παραγίνεται πραττομένης ταῦτα μαρτυρῶν ἐν γραμματείῳ γέγραμμενα id eſt.

Laws, publiſhed by a learned Writer (7). *Witneſſes ſhall not be allowed to depoſe but of ſuch Facts as were committed in their Preſence.*

The Rule laid down by Civilians, to be obſerved in teſtimonial Proof, is, that the Witneſs ſhall depoſe nothing but what he knows immediately, or to uſe their own Terms (8), *by Means of his corporeal Senſes.* But that we may more clearly be underſtood, Let us ſay in a Word, that the Witneſs ſhould be, in regard to the Matters he teſtifies, what a Looking-glaſs is in regard to the Objects it reflects. Like the Glaſs, the Witneſs ſhould repreſent Things as they truly are, without adding to, diminiſhing or altering them in any manner whatſover. But this can never be, ſhould he depoſe of Things he had not been preſent at: For as the Glaſs can reflect no kind of Objects but ſuch as are before it, the Witneſs cannot have perfect Knowledge, but of ſuch Things and Facts as happened immediately in his Preſence. And as the Glaſs would be falſe and imperfect, ſhould it repreſent Objects not in view, ſo would the Witneſs, ſhould he pretend to teſtify of Matters he had not ſeen or heard.

We find the Evangeliſt, St. *John*, in the firſt of his inſpired Epiſtles, giving it as a Reaſon why he ſhould

(7) Eorum quibus interſuerunt dum fierent & fieri viderunt teſtimonium dicanto. Sam. Petit. leg. Attic. Tit. 7.

(8) Teſtis debet reddere rationem dicti ſui per ſenſum corporalem puta viſum vel auditum Gloſ. ad l. Teſtium Cod. de teſtib. in add. ad marg. *Du Moulin dit que* Tabellarius non poteſt conficere inſtrumentum niſi de eo tantum quod in ſua preſentia geritur a partibus & ab eorum conſenſu pendet, cujus notitiam & ſcientiam habet propriis ſenſibus, viſus & auditus, & *il en allegue les textes.* Adde tamen quod etiam de his quæ aliis ſenſibus corporeis ut tactus odoratus & guſtus percipiuntur confici poteſt. Ibid. n. 64. Sect. 8. Tit. 1. Gloſ. Denombr. pag. 332.

ſhould be believed (9), *That he related nothing but what he had heard, ſeen with his Eyes, and touch'd with his Hands.* And even when *Chriſt* himſelf, who is the very Source of Truth, ſpeaks of his own Teſtimony, it would ſeem that he did not expect to be credited for any other Reaſon, but becauſe he related ſuch Things only as he had known and ſeen (1). *Believe me*, ſaid he to a *Phariſee*, *becauſe I ſpeak of what I know, and that I witneſs but of that which I have ſeen*; and a little after, *I give Teſtimony but of what I have ſeen and heard.*

All this ſeems founded on a Maxim univerſally received, which is, that the Certitude of *Knowledge*, ſo abſolutely neceſſary and eſſential to the Formation of a Proof or Teſtimony, cannot be acquired or produced but by the Sight or Hearing, there being but thoſe two Senſes only that are capable of collecting immediately, the Images and Species of Action and Words, which are neceſſary for producing perfect Knowledge in the Mind.

As for preſumptive or conjectural Proof, it is for the moſt Part quite different from either literal or teſtimonial Proof, tho', like theſe, it depends frequently

(9) Quod audivimus, quod vidimus oculis noſtris, quod perſpeximus, quod manus noſtræ contractaverunt teſtamur. Ep. 1. c. 1.

(1) Amen, amen dico tibi, quia quod ſcimus loquimur: & quod vidimus teſtamur. Joan. 3. 11.

Et quod vidit hoc teſtatur. Ibid. v. 32.

Quia viſu & auditu res percipiuntur: nec cenſeretur teſtis fuiſſe præſens niſi audiſſet & vidiſſet. Ut L. Diem proferre Sect. coram Cod. de arbit. ſed ſi teſtificetur de aliis quæ non percipiuntur viſu vel auditu, ſed guſtu vel odoratu aut tactu, debent deponere ſenſum illi appropriatum. Alias non eſſet ſufficiens probatio. ut Not. per Bartol. in L. 1. Cod. de verb. obligat. Gloſ. ad L. Teſtium. 13. Cod. de Teſtib. in verb. preſentia ſua & ibi addit ad marg.

quently on the Force of Titles or Writings, and of oral Evidence. But then this Dependence is not immediate as in the others. It reſts upon Hearſay, or ſome other ſuch foreign Prop, laying only ſuch Circumſtances in the Way as may help by Reaſoning, to the Diſcovery of Truth. But it is neceſſary to be remarked, that all Sorts of Preſumptions are not admitted in the Formation of ſuch conjectural Proofs as are received in criminal Proſecutions. Here, there are none admitted but ſuch as are manifeſt, indubitable, and clearer than Day (2). *There are two kinds of Signs or Conjectures, ſays the Stagarite, ſome from Opinion only, but others from Knowledge.* And theſe laſt are thoſe which the Law requires: For, as has been already obſerved, it requires undoubted Preſumptions, ſuch as are clearer than Day; that is to ſay, Preſumptions capable of forming Science or Knowledge, and which conclude by ſo neceſſary Conſequence, that it would be impoſſible Facts ſhould be otherwiſe than as they repreſent them. And, not to dwell but on what relates immediately to my Subject, ſuch are all thoſe that produce Effects, which can ariſe but from one ſingle Cauſe. For the Moment that an Effect can be imputed but to one Cauſe, you gueſs the Cauſe by the Effect, by an unqueſtionable Inference, which forms Science, or Knowledge of Cauſes by their Effects, or Effects by Cauſes.

But as for all Effects imputable to two or more different Cauſes, they can never come within the Deſcription of indubitable Signs or Preſumptions; for ſuch form not Science or Knowledge, but ſimple Doubt only. Wherefore ſuch are called equivocal Pre-

(2) In Rhet. ad Alex. c. 13. Ποῖει ὃ τῶν σημείων τὸ μὲν οἴεσθαι τὸ δὲ εἰδέναι. Signa vero efficiunt alia quidem opinionem, alia vero ſcientiam.

Preſumptions (3), becauſe by meaning or ſignifying two different Things equally, the Mind is divided and kept undeterminned. Such Preſumptions or Conjectures are termed by *Baldus* (4), *impertinent Means that prove nothing:* Becauſe, tho' the Means, that is the Effect be certain, it concludes not certainly ſo as to have Knowledge of the Cauſe by it.

Herein we are ſupported by the Law, from whence the following is a Caſe in Point (5). A certain Man maintained that another was a Slave; and in Proof of his Aſſertion, he ſhew'd that his Brother and Mother were then employed as Slaves. *But*, ſays the Law, *this Proof is frivolous, inaſmuch as Freedom is not always the Effect of one and the ſame Cauſe: if the pretended Slave had not been free by Birth, might he not have obtained his Freedom by other Means, ſuch as Chance and good Fortune*, &c.

But to enforce this Argument once again; all Effects imputable to different Cauſes, are not of the Number of indubitable Signs or Preſumptions required by the Law, to form a conjectural Proof, ſuch as is admiſſible in criminal Matters. And why, but becauſe the Inſtant that they may be imputed to two different Cauſes, it is hard to ſay preciſely to which of them they are imputable. It is the ſame as of a Fruit that had not been ſeen gathered. If there had been but one ſingle Tree that bore ſuch Fruit, it would be eaſy, on ſeeing the Fruit, to gueſs what Tree it had

(3) Id enim quo multa ſignificantur eſt ſignum ambiguum, & per conſequens fallendi occaſio. Sanct. Thom. in Sum. 3. p. Q. 60. art. 3. arg. 1.

(4) Per media impertinentia non fit probatio. Bald. in Rubric. L. 22. Cod. de probat.

(5) Ad probationem ſervitutis Glyconis, matrem ejus ac fratrem ſervilia feciſſe miniſteria non ſufficit, &c. cum de ſervis ex eadem matre natis libertatem unus adipiſci non prohibeatur. Dic. L. 22. Cod. de probat.

had been pluck'd from ; but if there were two ſuch Trees, there could not poſſibly be any Certainty in gueſſing : and the Incertitude would ſtill increaſe in Proportion to an Increaſe of the Number of ſuch Trees. Therefore when an Effect can proceed but from one Cauſe, it is eaſy to gueſs the Cauſe by the Effect ; but ſhould it be juſtly imputable to more than one, the true Cauſe can never be known with Certainty, and conſequently the Conjecture reſts upon Doubt. For this Reaſon, without dwelling on the various Diſtinctions of the Schools, which puzzle ſo much the Mind in regard to the Diverſity of Signs or Conjectures, it may be ſaid of all Conjectures in general, that they vary from the indubitable, which the Law requires, in Proportion to the Number of Cauſes of which they may be the Effects.

Having treated of the three and only Proofs admitted by the Law, in criminal Matters, we will now examine if Proof by Similitude of Hands may be deemed one of them ; which ſhall be the Subject of my third Propoſition.

I ſay then, in the third Place, that Proof by Similitude of Hands, is none of thoſe Proofs admitted and required by the Law, in Support of a criminal Proſecution. But this third Propoſition requires a more minute Diſcuſſion than the two others ; becauſe, tho' it be not leſs certain, it is generally leſs underſtood, more important, and that, on the Eſtabliſhment of which, depends as it were the Deciſion of the Point in Diſpute.

And firſt, can it be ſaid that the Compariſon of Hands forms a literal Proof ? I admit that Proof by Similitude of Hands is alway relative to, or if you will, founded on ſome Writing. But this is not enough ; for we have ſhewn that literal Proof takes its Force from ſome Deed or Writing immediately teſtifying the Truth by its own proper Weight and Authority. But

this can never be the caſe of ſuch Writings as are attempted to be eſtabliſhed by Similitude of Hands. Theſe ſeldom contain a Word of the Fact in queſtion, and furniſh no Lights but by Conjecture only, ſuch as, for Example, happens when a Forgery is endeavoured to be proved or diſproved by the Similitude of Hands. But to conſider the Matter in any Light, the Writing to be eſtabliſhed or proved, derives no Credit from it ſelf alone, becauſe it requires to be firſt proved, and that its Authority reſts on the Conjectures of thoſe Viewers appointed by the Court to make the Inſpection. Hence therefore I preſume to conclude, that Proof by Similitude of Hands is no *literal Proof* ſuch as the Law requires.

Nor can it with more, or indeed any Propriety at all be deemed a teſtimonial Proof, or Proof by Witneſſes; tho' it would ſeem, by the Practice lately introduced, that our Civilians had looked upon it as ſuch. For what elſe can be ſuppoſed, when we ſee it admitted in Proſecutions by Information, and Viewers indifferently allowed to prove like other Witneſs; and what is ſtill more extraordinary, confronted with the Perſons accuſed criminally.

But yet there is doubtleſs nothing more remote from the Nature of teſtimonial Proof than that by Similitude of Hands; and I perſuade myſelf that every Man of Reflection muſt think ſo. For it has been ſeen, that the firſt Condition eſſential to the Formation of Teſtimonial or Proof by Witneſſes, is that the Witneſs make Oath of the Fact; that is to ſay, that, in criminal Caſes, he ſwears to the identical Crime in Queſtion. But in Proof by Similitude of Hands, this can never be, becauſe the Viewers, as Viewers, can never ſwear but to the Similitude or Diſſimilitude of the Writings produced before them. That Similitude or Diſſimilitude not being the Fact or Crime in queſtion, but a Conjecture concerning it at moſt,

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therefore the Depoſition of Viewers can never amount to more than a Sign or Preſumption.

I am not ignorant that there are of theſe Viewers, ſome ſo preſumptuous as to encroach upon the Province of Witneſſes, by ſwearing that they believe ſuch and ſuch Writings to be true or falſe, or to be wrote by ſuch and ſuch a Hand, as if they had been preſent. But the Moment a Viewer ventures ſo far, he is no longer a Viewer, but an affected or rather a falſe Witneſs. For a Man may not, as has been before obſerved, ſwear in a Court of Juſtice, but to what he has ſeen or heard ; but to what was immediately the Object of his corporeal Senſes. Therefore a Viewer, as ſuch, ſees but the ſimple Similitude or Diſſimilitude of the Characters before him, and by Conſequence ought to ſpeak to nothing elſe : All that he ſays more, is a Proof of his Falſhood, or at leaſt of his Affectation. The Similitude, 'tis true, or the Diſſimilitude might induce a Viewer to gueſs or judge within himſelf of the Fact in Trial ; and it is not pretended here, to preclude him from thinking ; but let him remember, that there is a very wide Difference between gueſſing and knowing. Viewers are not examined as Gueſſers, but as ſkilful Viewers in the Art of Hand-writing. And they ſhould always bear in mind, that Juſtice diſpoſes not of the Life of Man upon imaginary Proof, ſuch as Gueſſes ; but requires the Certainty of Knowledge. Juſtice requires an Infallibility of Proof ; it requires, according to the Law (6), *Lights clearer than the Sun at Noon-day.*

I will go yet farther, and take upon me to ſay, that a Viewer not only cannot depoſe as to the Fact or Crime alledged to the accuſed, but can't depoſe, in quality of a Witneſs, as to the Similitude or Diſſi-

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(6) Luce meridiana clariores. Gloſ. ad d. L. ſcant. Cod.

militude of the Character laid before him, tho' they fall within the Cognizance of his Senſes, and that he beholds them with his own Eyes. The Reaſon is, as has been obſerved heretofore, that a Witneſs ſhould ſwear to Facts, and know them to be ſuch as he ſwears they are, not by Opinion or Judgment, but by the pure and ſimple Knowledge of his Senſes; or as Civilians term it, by his corporeal Senſe. Therefore ought the Matter atteſted, to be a Fact perfectly conceivable by the pure Knowledge of the Senſes, and not by Judgment or Opinion. We will endeavour to explain this Point yet more minutely.

There are two kinds of Acts which fall more immediately under our preſent Conſideration. The firſt are thoſe we conceive ſolely by means of the Senſes, ſuch as all Actions terminating in ſome Deed or Fact; the Notion of the ſecond, is formed chiefly by the Judgment; and ſuch are all Things that depend of Reaſoning or Argument. Nature alone guides us to the Knowledge of the firſt; but we are indebted to Art for a perfect Knowledge of the latter.

The firſt of theſe Facts may be proved by Witneſs, but the ſecond never; becauſe ſo ſoon as the Knowledge of a Fact depends ſolely on Skill or Art, all that can be ſaid concerning it is but Reaſoning, or rather Opinion; and Opinion is not Evidence. This Diſtinction is ſo ſelf-evident, that it could not have eſcaped the Notice of the Legiſlators; wherefore we ſee the (7) Law in all Things whereof the Knowledge depends on Skill or Art, forbidding the Practice of Evidence, and permitting the making uſe of ſkilful Viewers. Of this, among many others, we have a Text preciſely in Point, in the Ordinance of *Blois* (Art. 162.) That Law taking Notice of Male-Practice ſlip'd into the Proceedings of Courts of Juſtice

(7) L. 1. ff. de inſpiciendo ventre.

tice in regard to the Method of Information of the Price of Commodities, where the Price was to be aſcertained by the Court, Orders for the future, that no Witneſſes ſhall be heard in ſuch Caſes, but that the Parties at Law ſhall appoint ſkilful Viewers agreeable to the Court. And why, but becauſe the Knowledge of the Value and Price of Goods and Wares depended on Art and Experience, and not altogether on Nature.

Therefore, by a Parity of Reaſon, it is evident, that the perfect Knowledge of the Similitude and Diſſimilitude of Characters depends not on Nature only, but ſolely on Art and Experience. Nor need we a ſtronger Proof of the Truth and Solidity of this Argument, than the very Orders or Decrees of our Courts of Juſtice for making Proof by Similitude of Hands: For in theſe it is always added, *that the Inſpection ſhall be by Men ſkilful and experienced in the Art of Writing*; which would be quite needleſs if the Matter to be known could be aſcertained naturally and without Art.

But to examine this Matter farther; In what Manner do theſe Viewers depoſe as to the Similitude or Diſſimilitude of Characters? Is it not always by Reaſonings and Inferences fraught with Cunning and Subtility? Ask them how or by what Rule they pretend to judge, and they will tell you it is by their Skill and Art only; and indeed it cannot poſſibly be by any other Means; it can never be by the Aid only of ſimple Nature. And in what Manner do they proceed in their Examinations of different Characters? By ſeparating the Words of each Line, by dividing the Letters of each Word, by cutting the Letters ſometimes in half, by diſtinguiſhing the Bodies of the Letters from their Joining; and, in ſhort, by ſcrutinizing, and as it were torturing every Part of the Manuſcripts in queſtion. Is there any thing of Nature

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in all this? Is there, or can there be any Certainty in it? In ſhort, there needs only the identical Depoſition of one of theſe Viewers for a Stander-by, to convince him, that nothing depends more on Reaſoning and Art, and conſequently, that nothing has leſs of the Qualities requiſite for conſtituting teſtimonial Proof, or Proof by Witneſs. Theſe Viewers therefore, are more properly Referees or Judges, than Witneſſes, as has been judiciouſly obſerved by a learned Interpreter of the Law (8), ſaying, that the Depoſition of one of theſe Experts or Viewers, *is rather a Judgment than Proof.*

It remains then for us to examine whether Proof by Similitude of Hands participates of the genuine Nature of ſuch conjectural Proof as the Law admits in criminal Caſes. There is no denying, that it is of the Number of conjectural Proofs, inaſmuch as the End or Effect of it is to point out the Similitude or Diſſimilitude of two or more Writings, which is a Matter or Diſcuſſion purely conjectural. But are the Preſumptions or Conjectures ariſing from the Inſpection of Viewers, ſuch indubitable and certain Preſumptions as the Law requires in criminal Caſes? Or are they not rather of the Nature of thoſe doubtful, deceitful Preſumptions which the Law abſolutely rejects?

If in any Caſe, ſuch Preſumptions as ariſe from the Inſpection of Viewers by Similitude of Hands, can have no Weight, 'tis not queſtioned but it will be in ſuch as relate to Forgery. Let us ſee then, if in Matters of Forgery, it be poſſible from the Similitude of Hands, to form an indubitable Preſumption ſuch as the Law require in criminal Matters: For undoubtedly, if it be incapable of it in theſe Caſes, it muſt neceſſarily be ſo in all others.

Indubitable

(8) Magis judicium, quam teſtimonium. *Salycet.*

Indubitable Preſumption, as has been obſerved, is that which produces a Conſequence neceſſary for the Juſtification of the Thing or Fact of which it is the Preſumption or Conjecture: Let us ſuppoſe then, two Writings judged by Viewers to be alike, or to be as unlike as 'tis poſſible to conceive any two Things to be; Does it follow in the firſt Caſe, by a neceſſary Conſequence, that theſe Writings were wrote by one and the ſame Hand; or in the ſecond, that they were the Production of different Hands? In a Word, can the Truth or Falſhood of theſe Writings be aſcertained by means of any indubitable Neceſſity that reſults from the Similitude or Diſſimilitude of them? If it be a neceſſary, or rather infallible Conſequence, that two Writings alike, muſt be by one and the ſame Hand; and that two Writings which are unlike, muſt be the Production of different Hands; it would follow that two Writings by the ſame Hand could never be different, nor that two by different Hands could never be alike (9): For whether this happens rarely or often, it is no Proof of the Neceſſity of the Conſequence that ſome would deduce from it.

For in order that the following Conſequences, *viz. Here are two Writings alike, therefore they were written by the ſame Hand; and here are two Writings unlike, therefore they were wrote by different Hands:* I ſay, to prove the Truth of theſe Conſequences, it muſt be firſt eſtabliſhed for an unalterable Principle, that all Writings that are alike muſt be by the ſame Hand, and that all thoſe which are not alike, muſt be by different Hands. But who is it that dare advance ſuch a vague Principle? Who is there that can deny but

(9) Τὰ δὲ ἐνδεχόμενα ἄλλως, ὅταν ἔξω τὸ θεορεῖν γένηται, λανθάνει εἰ ἔστιν, ἢ μή.

Quæ enim ſeſe aliter habere poſſunt, cum longe a conſpectu remota ſint, necne, obſcurum eſt. Ariſt. 1, 6. Ethic. cap. 3.

but that every Day's Experience is a Proof that many Writings are alike, tho' wrote by different Hands? And that often two written by the ſame Hand are unlike? The only Principle therefore that can be eſtabliſhed in this Inſtance with any Safety, is, that the Writings or Characters of the ſame Hand are often, or, if you will, generally alike; and that ſometimes alſo, they are different. But who will take upon him to deduce a regular and uniform Conſequence from ſuch a Principle? Has ſuch an Argument as the following been ever made or known among learned and rational Beings? *Fruits growing on the ſame Tree are alike, therefore all Fruits that are alike grew on one and the ſame Tree.*

Let us proceed in this Diſcuſſion. We have already taken Notice, and it was on the Credit of no leſs a Perſonage, than that of the Prince of Philoſophers and Rhetoricians, that an equivocal Sign or Indication can never form an undoubted Conjecture; that it is equivocal when, for Inſtance, it is an Effect which may be imputed to two different Cauſes; and that it becomes the more equivocal, by its being imputable to more. Therefore, I ſay, the Similitude or Diſſimilitude of two Writings compared together, may be the Effect of different Cauſes, and conſequently no indubitable Conjecture can be formed hence.

May not ſuch Similitude or Diſſimilitude be as well the Effects of a ſtudied Imitation, as of Cuſtom or Habit? May it not happen fortuitouſly that two Perſons might write alike? May not the Effect be imputable to as many Cauſes as there are Artiſts that are capable of forging any Man's Hand-writing, Perſons capable of Writing alike, and in ſhort to as many Incidents as this Matter is liable to, either by Deſign or Chance? The Similitude, therefore, or Diſſimilitude of Hands, is not ſimply the common Effect of one Cauſe, but of ten thouſand; and this

being

being the Caſe, can any Sign or Indication be more equivocal, any Preſumption be more doubtful, or any Conjecture more deceitful?

Baldus, is very clear and minute, on this Subject, and furniſhes an exquiſite Definition of this Sort of Proof (1). *It is nothing more*, ſays he, *than an Argument taken from the real or probable Similitude of the Writings.* In my Opinion, this Definition is admirable, as it expreſſes not only the whole Nature of this Species of Proof, but all its Effects alſo. Its Nature is herein comprehended, becauſe in reality, the Baſis of this Proof is nothing elſe but Similitude; and all its Effects are explained, becauſe, after all one's Pains, it will be found, that except a probable Likeneſs, no other Effect can reſult from it. For let us ſuppoſe two Writings, the moſt alike that can be, laid before an unbiaſs'd Perſon for his Opinion; what would he; nay, what could he ſay, but that, *Here are two Writings ſo very like, that it is probable they were both written by the ſame Hand.* But, is not that founded on Probability only, the weakeſt of all Arguments? Would not a Scholar, would not every Man of common Underſtanding think him either mad or weak, that ſhould endeavour to impoſe by ſo unfair and ridiculous a Concluſion as the following, *ſuch a Thing or Fact is probable, therefore it is true?*

It is a thouſand times more rare to ſee two Children, born of different Parents, alike, than two Writings wrote by different Hands. For the Likneſs of two Perſons, born of different Parents, muſt be entirely fortuitous, whereas the Similitude of two Writings by different Hands, may be, as has been obſerved before, either by Deſign or Chance. The one cannot happen but by ſome ſuper-extraordinary Effort

(1) Scriptura ex qua fit comparatio, nihil aliud eſt niſi argumentum ſimili & vere ſimili. Bald. ad L. comparationes num. 34.

or Miracle of Nature, but the other may by the common Effects of Art, and by a thouſand natural Accidents. Yet altho' it be infinitely leſs common and more difficult to find two Perſons alike, who had been ſprung from different Parents, than two Writings wrote by different Hands, would it be allowed in a Court of Juſtice, for a Council to conclude from the Similitude of two Perſons, *that undoubtedly they were Brothers?* Or would any Judge decree ſuch a one to the Joint Heirſhip of an Eſtate? No Court would admit ſuch an abſurd Concluſion, and no Judge would venture to make ſo monſtrous a Decree; and yet tho' all Argument in Favour of the Similitude of Hands be far leſs concluſive, we ſee daily Judges admitting it in Proof, and riſking upon it not only Part of an Eſtate, but the whole Fortune, the Reputation, the Liberty and even Life of Men. Was ever any Practice leſs reaſonable or more dangerous and unjuſt?

One of the chief Principles of Wiſdom is, that he who had been once deceived ſhould always entertain a Diffidence of the Thing or Perſon that had deceived him; becauſe, in conſequence of another Principle of the ſame Directreſs, that Thing or Perſon who had once deceived, may deceive as often as 'tis put in his Power. To apply theſe Maxims to the preſent Point, how often have Courts and Judges of the greateſt Penetration and Self-ſufficiency, been deceived by the Similitude of Hands, as well as the Likeneſs of Perſons? We have many Inſtances in (2) Hiſtory, nay whole Chapters concerning important Impoſitions in conſequence of the Similitude of Perſons; but whole Libraries might be filled with Accounts of Impoſitions on private Perſons, on Judges, Courts, and even on the

(2) Valerius Max. de Similitud. form. L. 9. cap. 15.--- item Salin. Polihiſtor cap. 5. Opuſc. de la Mothe la Vayer Let. 26.

the moſt ſkilful Viewers, in conſequence of the Similitude of Hands? but the Thing is ſo common, that it is unheeded, unleſs perhaps on ſome very extraordinary Occaſions, or ſome Perſons of great Eminency and Rank happen to be concerned.

(3)*Cicero* reproaches *Mark Antony* with having made a Trade of counterfeiting the Hands of other Men, and with having accumulated much Wealth by Forgery. And *Suetonius* aſſures us, that (4) *Auguſtus* had ſollicitouſly taught his Children how to imitate his Hand Writing; the ſame Hiſtorian reports alſo (5), that the Emperor *Titus* was ſo dextrous at imitating of Hands, that all the World was deceived by his Imitation; in regard to which, the Prince was wont to ſay of himſelf, *that he had it in his Power to be a Forgerer of the firſt Claſs.* We find a moſt ſurprizing Inſtance of Forgery in the ſecret Hiſtory of *Procopius* (6), concerning a Citizen of *Edeſſa*, called *Priſcus*, who had forged the Hands of all his Fellow Citizens of any Wealth or Figure, and even of the moſt celebrated Notaries, ſo artfully, that he was never detected, nor even ſuſpected till at laſt, he himſelf owned the Fact. On which Occaſion the Hiſtorian remarks, that it was this notorious Inſtance of Forgery, that had produced that Conſtitution, wherein *Juſtinian* ordains, that from that time, no Preſcription ſhall take Place againſt the *Roman* Church of leſs than a hundred Years ſtanding. (7) *Philon*, the Jew, in his Tract againſt *Flaccus*, ſpeaks of a certain Forgerer, called *Lampon*, who was ſo peculiarly ſkilful

(3) Quo me teſte convinces? An Chirographo in quo habes ſcientiam quæſtuoſam. Philip.

(4) Suet. in Aug.

(5) Idem in Tito imitari Chirographa quæcumque vidiſſet, ac ſæpe profiteri ſe maximum falſarium eſſe potuiſſe,

(6) In Anecdot.

(7) L. 2.

in counterfeiting all manner of Hands, and all Sorts of Characters, and had committed ſo many and ſo important Forgeries, that he had the Nickname of Κα λα μοιφάκτης, as much as to ſay, *a Cutter of Throats with a Feather*. *Zazius*, in his *ſingular Anſwers*, mentions a certain Monk, whoſe Addreſs in counterfeiting private Signatures, and other Writings, was no leſs extraordinary. And (8) *Mornac* ſpeaks of a celebrated Forgerer that had been detected and impriſoned in *Henry* the Great's (IV's.) Reign.

But is it neceſſary to dwell on particular Inſtances, when all Authors who treat of this Subject, agree unanimouſly that the Imitation of Hands is not only practicable, but daily practic'd. And in Truth, who is he, that has not been deceived one time or other by the Similitude of Writing; and perhaps by that of even his own? And who ought to be more ſenſible of this Truth than Judges, to whom it may be applied what Chriſt ſaid to thoſe who brought him the adulterous Woman (9), *Let him condemn who has not been deceived*. And I can't help thinking that we ſhould hear but of few, and perhaps no Condemnations pronounced on the Strength of this Sort of Proof, if none were to pronounce but ſuch as had never been deceived.

But perhaps it may be urged in favour of this kind of Evidence, that Viewers, that is Adepts in the Art of Writing, have ſome certain Rule to go by. 'Tis abſolutely an Error to imagine a Certainty in any thing ſo neceſſarily fallible and uncertain. Daily Experience is a full and flat Confutation of any ſuch prejudiced Opinion. How often have theſe Pretenders to Skill, differed among themſelves? How contradictory their Sentiments; ſome maintaining a Writing to be an Original, others that it was a Copy only; ſome,

(8) Ad L. Comparationes.
(9) Cod. de fide inſtrum.

ſome, that ſuch a Writing was genuine, others, that it was forged? Need there a ſtronger Proof of the Incertainty of their Skill, and Danger of building upon their Evidence, than their own Diſagreements? Or can a more celebrated or important Inſtance of their Fallibility be ſeen than that mentioned by the Emperor *Juſtinian* concerning what had happened in *Armenia* in his own time, which has been already quoted by us in treating of his *Novel* on this Subject? Were not theſe the Words of the Preface to that famous *Novel* or Conſtitution? (1) *Inaſmuch as Writings that had been adjudged, by the Viewers, to have been forged, were afterwards own'd to be genuine, even by thoſe that wrote them*, &c.

Upon the whole, there can't be a ſtronger Proof of the Incertitude of the Art of the moſt ſkilful Viewers or Writing Maſters, than their own Confeſſions. Have they ever dared ſay poſitively, that two different written Papers were wrote by the ſame Hand? Never; the moſt they have ventur'd ſwearing, is, *that they believe, or that the Fact appears ſo to them.* So that in ſaying only that the thing appears ſuch to them, they avow that Moment that they know not the thing for certain, and that there remains only an Appearance, whence they form a Conjecture.

If then Viewers themſelves can have no certain Knowledge of the thing they pretend to prove, how can a Judge found a certain Senſe or Knowledge on their Evidence? Would any Man of Senſe or Probity regard the Teſtimony of a Witneſs, who, inſtead of depoſing abſolutely and peremptorily, ſhould only ſay, *that he is of Opinion the thing is ſo*; *that it appears*

(1) Nam cum probato permationis inſtrumento diſſimiles inter ſe ſcripturæ judicatæ eſſent, poſtea tamen, quam qui inſtrumento teſtes acceſſerant & ſuſcripſerant inventi ſunt & ſuſcriptionem ſuam agnæverunt inſtrumentum fidem accepit. d. n. 73. in præfat. ex verſ. Haloand.

pears ſo to him ; and that he believes the Thing to be ſuch(2). 'Tis not doubted but ſuch a Witneſs would be ridiculed in a Court of Juſtice. There is no doubt that the Law forbids the Admiſſion of ſuch Teſtimony ; for, according to *Ariſtotle, who can be ſure that the Thought and Opinion of another may not be the Effect of Untruth and Deluſion ?*

Is it poſſible then, that a Judge would found a Certainty on an Opinion, which is all that the Depoſition of the ableſt Viewer in the World can amount to ? Shall the Judge deem that to be certain, about which the Deponent himſelf owns he is dubious ? What ! was it ever pretended that a Judge could be more certain, than the Viewer or Witneſs from whom all his Knowledge derives to him ? But does not Nature, does not Reaſon tell us, that a Magiſtrate ought to act quite contrary ? Can he ever flatter himſelf that he knows a Thing or Fact better than the Perſon from whom he has had the Communication of it ? And does not Truth always looſe of its Force in Proportion to the Increaſe of the number of Channels thro' which it paſſes, as Wine that is poured in and out of ſeveral Veſſels ?

But there are ſome Inſtances wherein it muſt appear impoſſible to the moſt moderate Underſtanding, for the ſkilfulleſt Viewer or Artiſt in the World to judge of the Truth with Certainty by Similitude of Hands : For Example, where one is accuſed of forging the Hand of another, and that Viewers pretend to prove the Forgery by the Similitude of the forg'd with the uſual Writing of the Perſon accuſed. When

(2) Gloſ. de authent. de teſtibus in verbo, cognita. Gloſ. vidiſſe, in Sect. ſi vero abſunt. Auth. de hæred. & falc. Teſtis non debet teſtificari de credulitate ; ſed debet teſtificari ſic eſſe vel non eſſe. Ib. ad. d. ad Marg. ὑπόληψις γὰρ καὶ δόξα ἐνδέχεται διὰ ψεύδεσθαι. Nam exiſtimatione & opinione fieri poteſt ut mentiatur animus.

When the Conteſt is concerning the uſual Signature of one who denies his Hand-writing, 'tis poſſible an expert Viewer may trace out ſome Signs and Strokes of the ſame Pen, that may ſerve as a Foundation for building upon; becauſe, as the Diſpute is about his Way of Writing his Name, 'tis very poſſible to diſcover ſo much of Nature and Habit in it as may ſatisfy an experienced Viewer. But where a Man alters or diſguiſes his own Hand-writing to counterfeit that of another, where is the Poſſibility of coming at Truth? There is a perfect or imperfect Likeneſs between the genuine and counterfeited Writings. If perfect, one can ſcarce imagine that that which is accounted counterfeited ſhould be wrote by one who muſt counterfeit his own, to imitate the Hand of another. For he who would counterfeit the Hand of another always diſguiſes his own; and be the Diſguiſe ever ſo minute, 'tis impoſſible there ſhould be a perfect Likeneſs. There could be, at moſt, but ſome Strokes perfectly alike; but it is abſolutely impoſſible, that the whole ſhould be like the Accuſed's own uſual Writing.

If the Likeneſs be imperfect, it is ſtill more difficult to come at Truth. For all the Force of a Preſumption founded on Likeneſs, muſt conſiſt in the Perfection of that Likeneſs: therefore the Inſtant the Likeneſs is not perfect, one can be no ſurer that the two Writings were wrote by the ſame Hand, from the Perfection of ſo much of the Likeneſs as appears, than he can from an imperfect Likeneſs in every Part, that they were of different Hands.

I know what theſe deluded and deluding Viewers will ſay to back or colour their Depoſitions in Caſes of this Nature. Where the perfect Likeneſs appears to them, there, they ſay, the Accuſed was not able to diſguiſe his own Hand-writing; but where it appears imperfect, he ſucceeded. Thus, by a Strain

of

of Reaſoning as inconcluſive as ridiculous, they endeavour by every means to ſtrengthen their Opinion. But may it not really happen, that the Imperfection or Diverſity which appears in two Writings, may be the natural Conſequence of the Uſe or Habit of Writing of two different Hands; and that whatever Perfection or Likeneſs appears, may proceed from ſome fortuitous or natural Conformity, or from a labour'd Imitation? They impute the Imperfection or Difference to Art, and only the Perfection or Likeneſs to Nature; whereas it is as reaſonable at leaſt, to lay the Diſſimilitude or Imperfection to the Account of Nature, and the Perfection or Similitude to that of Art.

To enforce the Argument; it cannot be ſaid that two Perſons are the ſame, becauſe they have many reſembling Features; yet where there are many viſibly unlike, it may be certainly concluded they are two different Perſons. By ſimilar Reaſoning, it ought never to be concluded, that two Wtitings were wrote by the ſame Hand, becauſe there appears ſome Similitude; but on the contrary, it is ſafer and more reaſonable to conclude they are by different Hands, from any the leaſt Diſſimilitude that appears.

From what has been ſaid then, I flatter myſelf to have eſtabliſhed my third and laſt Propoſition; *viz.* that Proof by Similitude of Hands, far from amounting to either literal or teſtimonial Proof, did not amount even to conjectural Proof; that no Viewers are more fallible than ſuch as pretend to judge of Writings; that nothing is more erroneous and deceitful than their Conjectures; and by conſequence, that Proof by Similitude of Hands is none of thoſe three Kinds of Proof required by the Law in criminal Proſecutions.

Theſe three general Propoſitions being once eſtabliſh'd, the Conſequence is eaſily and naturally deduced;

duced; *viz.* that Proof by Similitude of Hands ought not to be admitted in Capital Accuſations. For if it be true, as I have endeavour'd to ſhew by my firſt Propoſition, that we have no Law that admits this Sort of Proof; if it be true, as I have proved by my ſecond, that the Law allows of none in Criminal Caſes, but literal, teſtimonial or conjectural; that is, Proof by undiſputable Writings, irreproachable Witneſſes, or by indubitable Preſumptions, clearer than the Day: And if it be likewiſe true, as I have made appear by my third Propoſition, that the Similitude of Hands, far from being capable of ſupporting ſuch an indubitable Preſumption as the Law requires, there is on the contrary, none more ſuſpicious and doubtful: If, I ſay, theſe Propoſitions have been proved, does it not naturally reſult from thence, that this Sort of Proof ought to be excluded in Criminal Matters?

I am not ſingular in this Opinion, it being that of all the celebrated Civilians that wrote on this (3) Subject; and without burdening the Reader with a long Catalogue of their Names, I may ſafely ſay, that not one of them ſeems to have been of a different. But it has been taken Notice of before, that there are three Objections made to my Concluſions. The firſt is, that the Law *Ubi* ordains that Proof by Similitude of Hands ſhall be admitted in Caſes of Forgery; and that the very Admiſſion is an Indication that the Law deem'd it a ſufficient Proof in ſuch Caſes. The Se-

(3) Quia ad effectum condemnandi in criminalibus, comparatio Scripturæ non probat diverſitatem manus quia ſæpiſſime fallax eſt; cum multi reperiantur qui alienas manus imitari ſolent, & quandoque mutatio calami vel atramentiætas, &c. & ſic præciſe poſt ripam curtium. Cravet. Decium. Francis. Marc. Vulp. Maſcard. Bajard. & alios docuit elegantur clarus, Dominus Farinacius. Q. 153. N. 18. de falſit. & ſimulatione. Nicolaus Genova de ſcript. privat. L. 1. q. 4. dub. 5. N. 7.

cond Objection is, that tho' it ſhould not be deem'd ſufficient Proof in all Caſes, yet might it at leaſt paſs for a Half-Proof. And the Third, that if this Sort of Proof be not admitted, moſt Crimes of Forgery muſt go unpuniſh'd, becauſe of the very great Difficulty there is of coming at a real Criminal by any other Means.

In order, therefore, to ſolve all colourable Objections, I ſhall endeavour to anſwer theſe before I conclude: And that I may examine them in the Order they ſtand, I do admit it is ſaid in the Law *Ubi*, that in Proſecutions for Forgery, the Judge ought to ſeek the coming at Truth, by all Means whatever, *even by the Similitude of Hands.* But it muſt be likewiſe admitted, that that ſame Law does not expreſs nor even inſinuate, that a Judge ſhall condemn on the ſole Evidence of Similitude of Hands. Here follow the expreſs Words of the Law. (4) *In Caſes of Forgery, let the Judge ſeek diligently the Truth, by Arguments, by Witneſſes, and by Compariſon of Hands: Let him endeavour coming at the Truth by all other Means poſſible.* Can it be ſaid then from the Tenor of theſe Words, that it was intended that Proof by Similitude of Hands ſhould be admitted ſufficient to convict a Perſon accuſed of Forgery? On the contrary, the leaſt Reflection muſt induce a Man to ſee, that the Law intended the Admiſſion of that Sort of Proof, rather in Favour than Diſfavour of the Accuſed.

'Tis acknowledg'd, that in no Crime more than in Forgery, the Difficulty of detecting the Criminal is greater; and, particularly, in that Species of it, which conſiſts in counterfeiting another's, or diſguiſing one's own Hand. Here, to confine myſelf to this Sort of Forgery, as being more immediately relative to my Subject,

(4) Ubi falſi examin inciderit, tunc acerrima fiat indago, argumentis, teſtibus, ſcripturarum collatione, aliiſque veſtigiis veritatis. L. 22. Cod. ad L. Corn. de falſo.

Subject, the Criminal covers and diſguiſes himſelf, and always aſſumes as it were, a foreign Shape and Character. But it muſt be admitted alſo, that the ſame Difficulty which occurs in detecting the Crime of an accuſed Perſon, occurs in detecting his Innocence. The more cover'd and ingenious the Contrivance, the more diſguiſed the Truth, and conſequently the more difficult to be come at. Truth and Falſhood, on theſe Occaſions, may be ſaid to be reciprocal. Falſhood is never hid but becauſe a Shade of Darkneſs is thrown over Truth; and therefore, there is as much Difficulty in being convinced of the Guilt of an Accuſed, as of his Innocency.

We will go yet farther, and ſay, that the Guilty run far leſs Riſk than the Innocent, when Proof by Similitude of Hands, is admitted in Caſes of Forgery. For the Guilty can be affected only in one Inſtance, which rarely happens; and that is, when he has not been ſkilful and ingenious enough to counterfeit to Perfection. But the Guiltleſs is expoſed to innumerable Dangers, either, becauſe Numbers may fortuitouſly write like him, or becauſe Forgers may imitate his Hand-Writing. In ſhort, ſo many as there are Men in the World, who may actually write like him, and ſo many Forgerers as there are capable of counterfeiting his Hand; So often, and ſo far may an innocent Perſon be ſuſpected and in Danger: And therefore, it is not the leſs true for ſeeming very extraordinary and ſurprizing, that an innocent Perſon arraign'd for Forgery, is infinitely more expoſed to Danger than the Guilty.

The grave and wiſe Legiſlators had maturely conſidered theſe Inconveniencies, from the Admiſſion of this Sort of Proof in Caſes of Forgery; and therefore, far from intending the Condemnation of the Innocent, rather than that the Guilty ſhould eſcape, we find the

Law on the contrary, (5) prefering the Safety of the Guiltleſs to the Puniſhment of the Guilty. But to avoid either of theſe Extremes, the Law ſeems to have taken extraordinary and ample Precautions, the better to diſtinguiſh the Innocent from the Guilty. For in other Criminal Caſes, where Truth is not quite ſo ſhaded and diſguiſed, the Law contents itſelf with the Teſtimony of two irreproachable Witneſſes; but here, it conſiders that the Depoſition of two Witneſſes would not be ſufficient; and why? Becauſe, all that two Witneſſes could depoſe would be, that they had ſeen the Accuſed write the Inſtrument or Writing in diſpute. But who can be certain that ſuch Witneſſes may not be deceiv'd, and may not miſtake one written Paper or Parchment for another? 'Tis not in this as in moſt other Criminal Caſes, where an Evidence may ſafely and poſitively ſwear to a Fact, as in Caſes of Murder, Robbery, Blaſphemy, Sacrilege, Perjury and ſuch like. The Veracity of two creditable Witneſſes ought not to be diſputed, that ſwear they ſaw an accuſed Perſon ſtab one that was kill'd, becauſe the Deceas'd was really kill'd. But the Moment any Writing is conteſted, that Inſtant it becomes dubious whether it be genuine or counterfeit; and therefore, the Witneſſes who ſhould ſwear they had been preſent when it was wrote, may be the firſt deceiv'd, becauſe it is poſſible, that the Writing before them may be one like that which they had ſeen written. We will explain this more amply.

In all Criminal Proſecutions, there are two eſſential Points to be conſider'd by Judges; in ſhort, there are two Things that ſhould appear manifeſt to them, in order for Condemnation. The firſt, that the Crime for which the Accuſed ſtands indicted, has been committed; and the Second, that the Accuſed had

(5) D. L. abſentem. ff. de Pæn.

had committed it. For Inſtance, in a Caſe of Murder, it ſhould be known for certain that a Man was dead; and that ſuch a one had kill'd him. In one for Robbery, it ſhould be undoubted that a Robbery had been committed; and that the Accuſed was the Robber. In like manner, in all Caſes of Forgery, it ſhould be firſt known for certain, that the conteſted Writing is forged or falſe, and that the Accuſed was the Forgerer. A Witneſs may ſafely ſwear that the Accuſed had written ſuch a Paper, becauſe he muſt know whether he ſaw him write or not; but to ſwear that the conteſted Writing is that which he wrote, is what no Man can do, unleſs he had had the Writing always in his own Cuſtody, becauſe he may be deceived by the Similitude of Hands. Even tho' a Witneſs had ſign'd his Name to ſuch a Writing, or affix'd any other Mark with the Pen, he might ſwear to the Identity of the Perſon, but not of the Writing, becauſe, as has been obſerved before, every Mark or Diſtinction he could make, might be counterfeited ſo as to deceive him and all the World beſides. It was therefore to ſupply in ſuch Caſes, the Incertitude of Oral Teſtimony that the Law *Ubi* ordains the Uſe of comparing Hands; not as a Method ſufficient of itſelf to prove a Forgery, but as one capable of aiding towards a Proof when join'd with the Depoſition of two creditable Witneſſes; and capable alſo of ſupplying the Inſufficiency of living Teſtimony in ſuch Caſes. To this End, it is obſervable, that *Disjunctives* are not made Uſe of in that Text of the Law, which ordains the admitting Proof by Similitude of Hands in Caſes of Forgery. The Text does not ſay, *or* by Witneſſes, *or* by Compariſon of Hands: But makes uſe on the contrary, of Copulatives, ſaying; (6) *by Witneſſes, by Compariſon of Hands, and*

(6) Teſtibus, collatione ſcripturarum, aliiſque veſtigiis veritatis. D. L. Ubi.

and by all Sorts of Ways by which the Truth may be traced.

The Law treats all other Criminal Caſes, except *Forgery*, in quite another Manner. In thoſe of Forgery it ſerves itſelf of the *Copulative*; requiring all Means for diſcovering the Truth, becauſe of the very great Difficulty of proving a Forgery artfully committed. But in other Criminal Matters, where there is a Poſſibility of more certain Proof, the Law accurately diſtinguiſhes, and ſerves itſelf of the *Disjunctive* inſtead of the *Copulative*. (8) *There muſt be reputable Witneſſes*, or *Authentic Writings*, or *indubitable Preſumptions clearer than the Day*. Any of theſe Proofs is thought ſufficient by the Law, in all Criminal Caſes, except *Forgery*, wherein the Similitude of Hands is admitted as a Proof in Aid of others no leſs uncertain than itſelf.

The ſame Spirit or Intention is perceptible in that Part of the Novel or Conſtitution, 73, which has been already quoted, tho' made a long Time after the Law. We have taken Notice in our Remarks on that Novel, that even in Civil Caſes, the Compariſon of Hands was not thought ſufficient without the Teſtimony of two reputable Witneſſes; nor the Depoſition of Witneſſes, without being ſupported by the Similitude of Hands, to ſhew the Neceſſity of having Recourſe to both conjunctively. Let it not therefore be imagin'd that the Law *Ubi* had ordain'd the Reception of Proof by Similitude of Hands, in Caſes of *Forgery*, with an Intention of ſubjecting an accuſed Perſon to greater Hardſhips; whereas, in Reality it was intended for his Benefit. That Sort of Proof is admitted to prevent a too precipitate Conviction in ſo dark and intricate a Matter as *Forgery*; 'tis, in ſhort,

(8) Quæ munita ſit, idoneis teſtibus, vel apertiſſimis documentis, vel indiciis ad probationem indubitatis & luce clarioribus. d. L. fin. Cod. de Prob.

ſhort, admitted more to ſave the Innocent than to deſtroy the Guilty.——The Similitude of Hands then, is no Proof in Caſes of Forgery any more than in all other Criminal Caſes.

But we will examine the ſecond Objection, which is, whether it might not amount to a *Half-Proof*: And here there is a Neceſſity of eſtabliſhing ſome Principles, *viz.* firſt, that properly ſpeaking, there is no ſuch Thing as a *Half-Proof*. 'Tis a barbarous Term, unknown to the Law; 'tis, in ſhort, a Chimerical Thing, an imaginary Being. This is ſo true, that there is not a ſingle Text in the Law wherein any Mention is made of ſuch Proof. The Term of a *Half-Proof* was of the Invention of ſome Interpreters; and very wrongfully and injudiciouſly, as *Contius* and Monſieur *Cujas* have remark'd. (9) " 'Tis a ſtrange " Error, ſaid theſe great Civilians, in certain In- " terpreters or Expounders, to call that a *Half-Proof* " which they ſuppos'd to have proved or diſcovered " the Truth but by Halves or imperfectly; becauſe " they ſay, that what proved Truth directly and am- " ply, was call'd a perfect or full Proof. But after " all, what is Truth half diſcover'd? Has half a " Truth been ever heard of? Is not that which is " true, perfectly true? And is not that intirely falſe " which is but half true?——It is therefore as im- poſſible there ſhould be Half-Proofs as Half-Men.

Proof,

(9) Eſtque Paralogiſmus hic falſus. Vox duorum eſt plena probatio, ergo vox unius eſt ſemiplena, quia veritas eſt indiviſa; et quod non eſt plene verum, non eſt ſemiplene verum, ſed plene falſum. Anton. Cont. ad L. 3. Cod. l. Jul. Majeſt. item Cujæc. ibid. Ut veritas, ita probatio ſcindi non poteſt. Quæ non eſt plena veritas, eſt plena falſitas, quæ non eſt plena probatio plane nulla probatio eſt. Denique juris conſulti non noverunt ullam probationem ſemiplenam. Item ad cap. Licet univerſis. Ext. de Teſtib. & Atteſt.

Proof, in its Nature, is indiviſible. That which diſcovers the Truth is a Proof; but that which diſcovers it but by Halves, is none; becauſe it leaves you to gueſs the Truth, but does not ſhew it.

I am ſenſible I ſhall be told on this Occaſion, that there are certain Caſes wherein the Truth is not clearly ſeen, but diſguiſed, or, as it were, perceiv'd under a Veil or Cover. I ſhall be told too, that, as Aſtronomers have certain Inſtruments, by which, tho' ſome Stars are not perfectly diſcover'd, yet ſo much is diſcover'd by Means of them, as is ſuppoſed to guide to Certainty. In like Manner, they will ſay, there are certain Arguments or Circumſtances relative to Crimes, by means of which, a Glimpſe may be had of Truth, and probable Conſequences may be deduced, tho' it be not fairly ſeen or obviouſly diſcover'd. Such, they ſay, don't come up to a Proof, but may impart an imperfect Knowledge, which may be call'd a Half-Science or Knowledge, and conſequently deem'd a Half-Proof.

To this inconcluſive Reaſoning I anſwer, that whoever ſees any Thing cover'd, ſees not the Thing but the Cover. Let it be endeavour'd to produce Truth in any Manner; it muſt be either ſo as to convince one that it is really there, or to furniſh him with Reaſons for being dubious that it is not as he would be perſuaded the Thing was. In the firſt Inſtance, it is actual Proof, but in the ſecond, 'tis nothing more than Suſpicion or ſimple Suppoſition. 'Tis true that Proof is not always equally ſtrong; and that Suppoſition is not always equally well founded. But then Proof, whether ſtrong or weak, is always Proof; and Suppoſition, whether ſtrongly or weakly founded, is ſtill but Suppoſition: And all the Philoſophers agree, that Quantity alters not the Quality of any Thing.

But as the Abuſe of the Thing has prevail'd, as the Interpreters have adopted the Term, as Monſieur *Cujas* himſelf, not diveſting himſelf of the vulgar Prejudice, has made uſe of it; and that, in fine, it would be cavilling about Words and ſimple Terms to detain either the Reader or myſelf about the Propriety of the Word *Half-Proof*, ſince it really exiſts in the Works of many Civilians, we will conform ourſelves to Cuſtom; and taking the Propriety of the Term, *Half-Proof*, for granted, we will examine, if, in this Doctrine of Half-Proof, Compariſon by Similitude of Hands, ought to be deem'd ſuch in Criminal Matters.

In order to ſet this Point in a juſt and clear Light, there is little elſe neceſſary, but to lay before the Reader two other ſhort Obſervations equally natural and obvious. The *Firſt*, that as there is a manifeſt Diſtinction and Difference to be made in Matter of *Proof* relative to either Civil or Criminal Matters, of which we have amply taken Notice heretofore, ſo, I ſay, ought there to be a very great Difference made concerning *Half-Proofs* in both Caſes. To form a *Half-Proof* in Civil Matters, it is ſufficient that there be a Preſumption only, which proves nothing, and is capable only of imparting a Suſpicion. (1) This is expreſly Monſieur *Cujas*'s Opinion, even where he introduces the Similitude of Hands in Civil Caſes, as a Half-Proof, tho' he owns it proves nothing. But with regard to Criminal Matters, he is clearly of Opinion, that all Half-Proofs ſhould be abſolutely reject-

(1) Semiplenam vocant quæ nulla eſt, quæ nil probat; ut argumenta quæ fidem judici non faciunt, ſed eum in Suſpicionem adducunt. Hujuſmodi eſt comparatio litterarum quæ per ſe, ſola fidem non facit. Cuj. ad l. in bonæ. Cod. de Reb. cred.

ed, as incapable of proving anything, (2) or even of imparting a Suppoſition, ſuch as the Law requires in Criminal Caſes, (3) which ſhould be *evident and indubitable, and clear as the Day.*

The *Second* Obſervation is, that, tho' the Law includes, *indubitable Preſumption* in the three Kinds of Proof admitted in Criminal Matters, it muſt not be ſuppoſed that theſe Preſumptions are ſuch perfect Proof as ſhould induce a Judge to found a definitive Sentence upon: For there are no perfect Proofs, but ſuch as conſiſt of Authentic Writings or Oral Evidence. Let Preſumptions be never ſo clear, they are ſtill but imperfect Proofs. For, according to Monſieur *Cujas*, (4) *there are, properly ſpeaking, but two Sorts of Proof; viz. Authentic Writings and Witneſſes:* (5) And even when the Law ſpeaks of perfect Proof, it never mentions but the two Sorts aforeſaid.

I am ſenſible however, that elſewhere, the (6) Law ſuppoſes clear Preſumptions to be equally valid with Authen-

(2) Sed nec de ſuſpicionibus quemquam damnari oportere divus Trojanus aſſidio reſcripſit. L. abſentem ff. de Pænis. Plus ex quam ſi indicio dixiſſet, *ſays Godfrey, on the Word,* ſuſpicionibus. *And Monſieur Cujas ſays,* qui ſuſpicatur, plus ſe videre putat quam qui præſumit. ad cap. Licet univerſis. Ext. de Teſtib.

(3) Indiciis indubitatis & luce clarioribus. l. ſciant. Cod. de probat.

(4) Et duæ præcipuæ maximæque ſunt probationum ſpecies, inſtrumenta & perſonæ. Cujac. in parat. ad T. Cod. de prob.

(5) In exercendis litibus eandem vim obtinent tam fides inſtrumentorum, quam depoſitiones teſtium. L. 15. Cod. de fid. inſtrum.

(6) Indiciis certa quæ jure non reſpuuntur, non minorem probationis, quam inſtrumenta continent fidem. Quo jure ſi de proprietate Dominus ambigis, negotiumque integrum eſt, uti non prohiberis. L. 19. Cod. de rei vindic.

Authentic Writings and Witneſſes; but in the ſame Text, is it expreſly ſaid, that this ſhall be in Civil Caſes only, in Litigations concerning mere Matters of Property. I am ſenſible likewiſe, that the Law (7) which regulates the Proofs admiſſible in Criminal Caſes, reckons indubitable Preſumptions equal to Authentic Writings and Witneſſes. But it is remarkable that that ſame Law ſpeaks not of ſuch full or perfect Proof as ſhould warrant a Magiſtrate to found a Sentence of Condemnation upon, but only of ſuch as is allowable by Law. For in Matter of Proof, there are two Conditions neceſſary. One, that the Proof be legal; the other, that it be perfect. By legal Proof is meant, that it ſhould be ſuch as the Law allows ſufficient to ground a Criminal Accuſation upon, ſo as to exempt the Accuſer from being indicted or puniſhed for being a Calumniator: And by perfect, that it ſhould be ſo full and plain as that a Judge may ſafely ground a definitive Sentence upon it. Therefore in that Law, which admits indubitable Preſumptions in Criminal Caſes, as aforeſaid, the Queſtion is not about ſuch Proof as one might ſafely found a definitive Sentence of Condemnation upon, but on that only which was neceſſary for an Accuſer towards exempting himſelf from the Penalties inflicted by the Law on ſuch as accuſe falſely or without Foundation. This appears evidently by the Text of that very Law, which is purely relative to Accuſers and not to Judges, and addreſs'd to the former. (8) The Law does not ſay, that ſuch Proof (that is by undoubted Preſumption) ſhall be ſufficient to ground a definitive Sentence of Condemnation upon, but ſimply *that it ſhall be ſufficient to ground a Proſecution upon it*. And this ſeems to have been Monſieur

(7) D. L. ſciant.

(8) Sciant cunctis accuſatores eam ſe rem deferre in publicam notionem debere, &c. d. L. ſciant. Cod. de prob.

ſieur *Cujas*'s Opinion ; for after he ſays, that there are but two kinds of perfect Proof, *viz.* (9) by authentic Writings, and by Witneſſes, he goes on, *to which may be added indubitable Preſumptions, as being of the Number of legitimate or legal Proof.* It is obſervable, that he ſpeaks only of *legitimate*, but not of *perfect* Proof : And it was proper he ſhould do ſo ; for the Law knows of no *perfect Proof* but ſuch as is founded on authentic Writings, or living and creditable Witneſſes. Juſtice has but theſe two Eyes to ſee by and help her to diſtinguiſh Truth from Falſhood, without Deception : (1) And according to *Heliodorus*, there is no being perfectly ſure of any thing in the World ; that is, *there is no coming at the perfect Knowlege of any controverted Fact, but by two ways*, viz. *by the Authority of authenticated Writings, or on the Credit of reputable Witneſſes.*

Theſe two Obſervations, therefore, ought to paſs, and have the Face of two conſtant Maxims, *viz.* Firſt, That there are no Preſumptions but the indubitable admitted by the Law in criminal Matters ; and, ſecondly, that tho' they are admitted, the Law deems them only as imperfect Proof. From hence then, it is eaſy to form a Judgment of the Weight of the Half-Proof of ſome of the Interpreters, in criminal Caſes. For if none but indubitable Preſumptions are admitable in criminal Matters, and if even ſuch Preſumptions are wholly uncapable of forming an intire or perfect Proof, it follows neceſſarily that they can be no other than Half-proofs ; for according to all the Civilians,

(9) Et duæ precipuæ maximæque ſunt probationum ſpecies, inſtrumenta & perſonæ : His addi poſſunt argumenta, ſigna & indicia certa quæ jure non reſpuantur, indubitata & omni luce clariora ; & hæc genera legitimarum probationum. Cujac. Parat. Cod. ad Tit. de Probat.

(1) L. 10. Hiſt Æthiop.

vilians, (2) *a Half-proof is nothing elſe but an imperfect Proof.* So that ſhould a Man gain upon himſelf to believe that the Law-makers intended that Half-proofs ſhould be admitted, he muſt neceſſarily admit likewiſe, that they deem'd none to be ſuch but indubitable Preſumptions; for it is certain, that wherever a Half-proof is required or admitted, the Law always requires that it ſhall be form'd of evident and undoubted Preſumptions. The Law is ſo clear on this Point, that we have numberleſs (3) Texts which prove it: and moſt of the celebrated Civilians concur with the Law in this particular. *Paponius* writes expreſly and directly to the Purpoſe, and cites *Accurſius*, *Aretinus* and *Baldus*, as being of the ſame Opinion. (4) " Judges, ſays he, having no " other Proof againſt a Criminal, but ſuch as reſult " from Preſumptions, ought not, even tho' ſtrong " and indubitable, to paſs as ſevere a Sentence upon " him, as if the Proof againſt him had been by Wit- " neſſes depoſing to have ſeen and been preſent at the " Commiſſion of the Fact. He ought, in ſuch caſe, " to ſhew Favour and Lenity.

But perhaps I ſhall be told, that there are ſome Preſumptions ſo very ſtrong and forcible, as to form a Conviction; that is, they are of ſuch a Nature as to convince the Judgment. I own, and I have ſaid before, that there are Preſumptions which conclude by a neceſſary Conſequence, and are capable of producing

(2) *It is therefore called a Half-proof.* Semiplena probatio.

(3) Ad tormenta ſervorum ita demum venire oportet cum ſuſpectus eſt reus & aliis argumentis ita probationi admonetur ut ſola confeſſio ſervorum deeſſe vidiatur. L. 1. ff. de Quæſt. Item. L. milites. Cod. eod. & l. 3. C. ad L. Jul. --- Maj. ubi. Cujac.

(4) Papon. L. 24. T. 8. N. 1. *of his Collection of Decrees in Criminal Caſes.*

ducing Science or Knowledge. But the (5) Science of a Judge, or even the Conviction of an Accuſed, are not always ſufficient to ground a Sentence of Condemnation upon.

There are two Sorts of Sciences; and there are alſo two Sorts of Convictions. There is one Science which produces a moral Certainty, and another which produces a phyſical Certainty. That Science producing a moral Certainty, depends upon Reaſon and Argument, and is founded on Preſumptions; and that Science producing a phyſical Certainty, depends immediately on the Senſes; ſuch as the Science or Knowledge of Witneſſes, who had ſeen the Crime or Fact committed. Theſe two kinds of Sciences form two different Sorts of Convictions, a moral Conviction, and a phyſical Conviction. Therefore the moral Science and Conviction are capable of founding a Judgment or Decree upon, in civil Caſes; but are never ſufficient, in criminal Matters, for a Judge to ground a definitive Sentence upon in Diſfavour of an Accuſed. And the Reaſon is this; they ſuffice in civil Caſes, becauſe the Litigation is concerning private Property, and that all the Diſcuſſions of the Law relating to Property, are purely moral. In all civil Matters the Law depends upon, and conſiders no Science or Conviction but the moral only. But in all criminal Matters, the Law relies upon, and conſiders only the phyſical Science and Conviction; and therefore all moral Science and Conviction are abſolutely inſufficient to found a Judgment upon in capital Caſes.

This Diſtinction is not only true but important and neceſſary towards rightly underſtanding many Texts of

(5) *The Science or Knowledge neceſſary, ſhould be legal and regular; for a Judge ought not to condemn on the Streſs of private or particular Science or Knowledge.* Sed ſecundum allegata & probata.

of the Law, wherein we find it laid down (6), that tho' a Perſon be convicted of a capital Crime, a Judge ought not for all that, condemn him to die, without ſtronger and better Proof. This can only be underſtood in the Senſe we have juſt now mentioned; that is, where a Man is convicted on the Foundation of a moral Science and Conviction, ſuch as reſult from an undoubted Preſumption forming a Half-proof. Monſieur *Cujas* and *Contius* expreſly explain that Text in this Senſe. On the Suppoſition therefore, that this is a true State of the Caſe, who can ſay that Proof by Similitude of Hands ought to paſs for, or be deemed a Half-proof in criminal Matters? It is certainly impoſſible to ſupport ſo ill-founded a Propoſition. For we have taken notice, that nothing leſs than indubitable Preſumption, clearer than Day, can form a Half-proof in criminal Caſes. And we have ſhewn beyond all doubt, that Preſumptions founded on the Similitude of Hands, are in their very Nature, the moſt doubtful and obſcure that can poſſibly be imagined. By conſequence then, there are no Preſumptions farther from the Nature of ſuch as are capable of forming a Half-proof in criminal Caſes, than thoſe ariſing from Similitude of Hands.

But we ſhall ſhew further, that tho' this Sort of Preſumption, had been as evident as it is obſcure, and

(6) Si quis alicui majeſtatis crimen intenderit, cum in hujuſmodi re convictus, minime quiſquam privilegis dignitatis aſtrictiore inquiſitione defendatur. Sciat ſe quoque tormentis ſubdendum, ſi aliis manifeſtis indiciis accuſationem ſuam non potuerit probare, cum eo qui hujuſmodi eſſe temeritatis reus deprehenditur. L. 3. Cod. ad. l. Jul. Majeſtat. ubi Contius in verb. convictus, ſic ait. convictus non quidem plene alioquin ſtatim damnaretur, ſed imperfecta, & ut aiunt, ſemiplena probatione.

Et Cujac. Ibid. convictus, ſcilicet manifeſtis indiciis de quibus ipſa lex loquitur.

and as infallible as it is deceitful, it would not ſtill anſwer the Purpoſe. For to form a compleat Half-proof, the (7) Law has no Regard for ſingle Preſumption; it always requires many. There *muſt be*, ſays the Law, *indubitable Preſumptions*; always, on this Point, extending to Pluralities, and never confining itſelf to the ſingular Number. By the Law, the Evidence of a ſingle Witneſs ever ſo unblemiſhed Reputation, does not amount to a Half-proof. And tho' there is no diſputing that the Evidence of one who had ſeen a Fact committed, is infinitely more to be regarded than the moſt undoubted Preſumption; yet the Law does not even condeſcend that it ſhall be offered, much leſs admitted as a Half-proof. There are ſeveral Texts of the Law to this Purpoſe: And Monſieur *Cujas* particularly underſtands them in this Senſe, as may appear from his Refutation of *Accurſius*, who argued that the Evidence of a ſingle irreproachable Witneſs did form, and might be admitted as a Half-proof. (8) *It is faulty and*

(7) Judicis ad probationem indubitatis. d. L. Sciant. Cod. de Prob. Item L. 19. Cod. de rei vindicat. L. 13. Cod. de jur. dot. L. 3. Sect. 4. ff. de ſuſpect. tutor. L. 11. C. de litt. jurando. L. 34. Sect. 3. ff. de Legat. 1. L. 14. de contrah. ſtipul. Cod. & L. 17. in fin. ff. de manumiſſ. teſtam.

Manifeſte ſancimus ut unius ominino teſtis reſponſio non audiatur, etiamſi præclaræ curiæ honore præfulgeat. L. jusjurandi 9. Cod. de Teſt. Unius teſtimonio non credendum. L. Maritus, ff. de quæſt. Unus teſtis nullus teſtis, id eſt unus teſtis nihil probat. Cujac. ad L. in bonæ 3. Cod. de Reb. credit. Item Ant. Contius, ad L. 3. Cod. ad L. Jul. Majeſt.

(8) Errant dum unum teſtem affirmant eſſe probationem ſemiplenam Duo, inquiunt teſtes faciunt plenam probationem; ergo unus ſemiplenam. Sed hæc collectio vitioſa eſt; & eadem atque ſi diceret. Duo perficiunt numerum ergo unus aut unum eſt numerus imperfectus, aut ſemiplenus. Quod eſt falſum. Nam unum non poteſt dici numerus. Cujac. ad L. Jul. Majeſt. Cod.

and erroneous Reaſoning, ſays he, *to endeavour paſſing the Evidence of a ſingle Witneſs for a Half-proof, under Pretence, that the Evidence of two Witneſſes forms a whole or entire Proof. 'Tis juſt as if you ſhould ſay; two Units form a Number; and by conſequence, one Unit is a Half-number. But who has ever heard of ſuch a Thing as a Half-Number?*

But is not the Law in this Particular agreeable to that of God, in the Scriptures, prohibiting the Reception of ſingle Evidence in criminal Matters? (9) *One Witneſs ſhall not riſe up againſt a Man for any Iniquity; or for any Sin, in any Sin that he ſinneth; at the Mouth of two Witneſſes, or at the Mouth of three Witneſſes, ſhall the Matter be eſtabliſhed.* It is obſervable here, that God does not only forbid the Condemnation of an accuſed Perſon on the Teſtimony of one Witneſs, but actually prohibits the Reception or Appearance of a ſingle Witneſs againſt a Perſon criminally accuſed; that is, he prohibits even founding an Accuſation on the Teſtimony of one ſingle Witneſs: And 'tis plain, that St. *Paul* underſtood the aforeſaid Law in this Senſe (1); for he expreſly forbids, in many Places, the Reception of a ſingle Witneſs in criminal Accuſations: But Proof by Similitude of Hands, as has been already obſerved, being but a Preſumption, and ſingle too, is of far leſs Conſideration, than the Teſtimony of a ſingle Witneſs; and therefore ought to be deemed of leſs Force, and conſequently ought never to be admitted in criminal Matters. For tho' there had been a hundred Viewers to depoſe concerning the Similitude, their Number would not multiply that of Preſumptions, becauſe the

 Reſemblance

(9) Non ſtabit teſtis unus contra aliquem quidquid peccati & facinoris fecerit. Deut. 19. 15.

(1) Accuſationem noli recipere niſi ſub duobus vel tribus teſtibus. 1 ad Timot. 5. 19. & ad Heb. 10. 28.

Reſemblance of the Characters would be ſtill but one, and could not admit of Diviſion or Multiplication. Suppoſe, for inſtance, that a thouſand Witneſſes ſhould depoſe the ſeeing a Drop of Blood on the Cloaths of a Perſon accuſed of Murder, that Cloud of Witneſſes would ſtill form but one ſingle Conjecture. In like manner therefore, ſhould a thouſand Viewers depoſe concerning the Similitude of two Writings, their Evidence could form but a ſingle Preſumption, as being relative only to one Similitude or Reſemblance. Hence therefore, let us conclude, that the Compariſon of Hands does not amount to even a Half-proof in criminal Matters, not only becauſe it is founded on the moſt ſuſpicious and doubtful Preſumption, but becauſe it can never form any more than one Preſumption, and that the Law requires more. I am not ſingular in this Opinion; for it is that of the moſt eminent Civilians that have wrote on this Subject (2): And tho' ſome few have attempted an Oppoſition to the Majority, their Fewneſs is a tacit Proof of their miſtaken Singularity.

But I advance farther, not only that the Similitude of Hands is not ſufficient for the Formation of a Half-proof, in criminal Matters, but that it is incapable of producing the leaſt or ſlighteſt Preſumption, when the conteſted Writing is atteſted or ſigned by two Notaries, or by one Notary and two Witneſſes; Whe-

(2) Comparatio litterarum de ſe ſola, adminiculis minime concurrentibus, nec etiam facit indicium ad torturam, ut videre eſt apud Ripam in L. admonendi n. 100. & ibi etiam Curt. n. 116. ff. de jurejur. Aymon, de antiq. temp. part. 1. S. quæritur etiam, & n. 72. Dec. conſ. 615. n. 3. poſt Med. Fran. Marc. Decis. 935. part. 2. Vul. conſ. crim. 135. n. 14. Marcar. de probat. L. 2. concl. 626. n. 29. & conc. 740. num. 10. & ſeq. Bayard ad clat. in S. falſum. n. 108. Proſp. Farinac. de falſ. & ſimul. q. 115. part. 6. n. 118. Nicol. Genova Patav. de Script. priv. L. 1. q. 4. dubit. 5.

Whether the Notaries and Witneſſes be dead, or ſtill living, and recollecting their own Signatures. This Propoſition may ſurprize at firſt, and the rather, that at the Beginning of this Diſcourſe, I laid it down as an invariable Maxim, that Writings ſo authenticated amounted to a full and perfect Proof in civil Matters. But tho' it would ſeem reaſonable that what forms an entire Proof in civil Caſes, might be admitted for a Half-Proof at leaſt, in criminal Proſecutions; yet I aſſure myſelf, that every conſiderate Reader will be of my Opinion.

Towards the right Comprehenſion of this Point, we will ſuppoſe a Proſecution for Forgery, wherein Proof by Similitude of Hands ſeems naturally introduceable. A Man, for inſtance, is accuſed of having forged the Signature of another to a Contract atteſted by two Notaries, or by one Notary and two Witneſſes. Let us ſuppoſe, that this Contract had been in the Name of *Titius*, and ſaid to be ſigned by him, but that *Sempronius* is accuſed of having forg'd his Hand. I would ask, if in this Caſe, Viewers being appointed by the Court, and depoſing, that according to their Art and Skill, the Writing was of the Hand of *Sempronius*, and conſequently, that the whole Contract was forged; I would know, I ſay, if any Credit ought to be given to ſuch Evidence, on a Pretext that the Inſtrument of Contract is indued with all the Solemnities required by the Novel, or Inſtitution? Now, I take upon myſelf to ſay, that no Credit whatever ought to be given to ſuch Evidence, whether the Notaries and Witneſſes be living or dead, their Signatures being ſo far from corroborating the Depoſitions of the Viewers, that they would intirely deſtroy their Evidence, and take away the Force of all Preſumptions. The Contract or Writing being authenticated by Notaries and Witneſſes, is the very thing that would deſtroy the Credit of

Viewers that ſhould depoſe it to be forg'd from the Lights of their Art. They would and ought to meet with much more Credit, if the Writing had not been atteſted at all. The Reaſon is, that as ſoon as an Act paſſed in the Name of *Titius*, and ſigned by *Titius*, is atteſted in Form by two Notaries, or by one Notary and two Witneſſes, that Act becomes inſtantly, an authentic written Proof, which had been paſſed by *Titius*: And it is a Maxim in Law (3), that no Proof, even by living and reputable Witneſſes ſhall be received againſt an authenticated written Proof. For before it could be received, the Act or Writing ſhould be declared falſe, and the Notaries that had counterſign'd or atteſted it ſhould be proſecuted for atteſting a falſe or fraudulent Contract. By Conſequence, the ſimple Conjecture of Viewers, which is infinitely inferior to oral Teſtimony, ought not to be conſidered or received in Diſproof of an Act ſo authenticated.

I ſay further, and maintain, that a Plea of Forgery is not admittable againſt ſuch an Act or Writing as is mentioned above, unleſs better Proof be offered in Support of it than any that can be deduced from the Similitude of Hands, by Viewers. The Reaſon is, that, ſuppoſing ever ſo great a Number of Viewers had judg'd that the Name of *Titius* had been written by the Hand of *Sempronius*, yet theſe are ſtill but conjectural Viewers who oppoſe, or would deſtroy the Force of the Atteſtations of two Notaries, or of one Notary and two Witneſſes. Therefore, where the Competition is between the written Teſtimony of two Notaries, or one Notary and two Witneſſes, and the Depoſition of Viewers, it cannot be ſaid, that the latter ſhould prevail; for there is an expreſs Text in the

(3) Contra ſcriptum teſtimonium, teſtimonium non ſcriptum non ſertur. L. 1. Cod. de teſtibus.

the 73d Novel, which ſays (4), *Wherever the Depoſition of Viewers is found to contradict the Teſtimony of Witneſſes that had ſigned or atteſted the controverted Act of Contract, the Witneſſes ſhall always be believed before ſuch Viewers or Experts.*

I will go yet greater Lengths, and ſuppoſe, that the Notaries or atteſting Witneſſes to the Writing in Diſpute, ſhould agree with the Viewers, and depoſe, that tho' it be in the Name of *Titius*, they believe it to have been written by *Sempronius*, ſtill, I ſay, ought not their Evidence to affect *Sempronius*, becauſe, in ſuch Caſe, the Notaries and Witneſſes would depoſe againſt their own proper Act, which is never allowed or admittable by the Law (5).

But what ſhall we ſay, if the Notaries or Witneſſes who had ſign'd the Contract, ſhould be dead or abſent, and therefore ſhould neither ſupport nor invalidate the conteſted Act? I ſay, that if abſent and regularly ſummon'd, they ſhould be proceeded againſt for Contempt, and for Forgery; and even convicted before the Faith and Force of their Signatures could be deſtroy'd: If dead, (6) their Memory or Fame ſhould be criminally arraign'd, becauſe a public Act can never be ſet aſide as falſe or ſuppoſitious, before the atteſting Notary be firſt judicially declared

(4) Si vero tale aliquid contigerit, quale in Armenia, ut aliud quidem faciet collatio litterarum aliud teſtimonia, *&c.* Tunc nos quidem exiſtavimus eaquæ viva dicuntur voce, quam ſcripturam ipſam ſecundum de ſubſiſtere. Nov. 73. S. q.

(5) Nimis enim indignum eſſe judicamus, ut quod quiſque ſua voce proteſtatus eſt, id in eundem caſum infirmare proprioque teſtimonio reſiſtere valeat. L. 13. Cod. de nonnum. pecun.

(6) *By the Civil Law a dead Perſon may be arraign'd criminally; as well as one abſent; and the latter, if convicted, is generally hang'd in Effigy.*

declared a Forgerer. And I ſay farther, that in Caſe the atteſting Notaries are dead, the Depoſition of Viewers on the Strength of the Similitude of Hands, ſhall never be capable of invalidating the public Act, no, not tho' it ſhould be ſtrengthen'd by a Plea of Forgery. For the Evidence of a Man is confirm'd by his Death; a Maxim founded on the ſame Reaſon which induced the Legiſlator in the 73d Novel to ordain, (7) *that if the Notaries and Witneſſes be dead, who had ſign'd the Act, their Signatures ſhall be deem'd Proof, without requiring the Support of any other, except that of proving their Hands.* I ſay then, by ſimiliar Reaſoning, that when the atteſting Notaries or Witneſſes to an Act are dead, their Teſtimony acquires new Force by their Death, this laſt Act of their Lives paſſing for the moſt Authentic Confirmation that can be of their Depoſitions. (8) *Death*, ſays the Law, *ſhall in theſe Caſes, have the Force of living Evidence after being ſolemnly croſs-examin'd and confronted.* The Reaſon is, that it is always preſumed, that a dying Man, juſt upon the Point of accounting before God, would not go out of the World without revealing his Forgeries, as being the only Attonement he could make to his Creator and his Fellow Creatures. A certain Law in *Athens* to this Purpoſe was probably built on the ſame Foundation. For tho', by a general Law in that Commonwealth, all Evidence of Witneſſes that did not depoſe to have been preſent at the Commiſſion of the Fact in Diſpute, was abſolutely rejected; yet by (9) another, thoſe were

(7) D. Cap. ſi vero moriantur. D. Nov. 73. ut ſup.

(8) L. fin. Cod. de Teſtib. fin. autem omnes teſtes ab hac luce ſubſtracti ſint, tunc neceſſitatem imponi fide ſcripturæ approbata in qua diſpoſitiones teſtium referuntur, eas quaſi factas accipere.

(9) Ἀκύρων εἶναι μαρτυρεῖν τεθνεῶτος ἐκ μάρτυρείας ἢ ὑποσχέσεως ἢ ἀδοράτου. Id eſt. De re a mortua accepta aut peregre geſta

were excepted who ſhould depoſe to have heard from a Perſon deceas'd, that the Fact had been committed, and by ſuch a one. That conſiderate People would have the ſame Credit given to the Words of the Dead as to the Eye-ſight Teſtimony of the Living; and would admit of no Difference between depoſing to have ſeen a thing or heard it from one deceas'd.

Let us ſay then, that the Similitude of Hands, far from amounting to a Half-proof in criminal Caſes, ought not even to be admitted, tho' it ſhould be to invalidate a public Act; becauſe the Preſumptions ariſing from, or founded upon the Similitude or Diſſimilitude of Hands, can never equal the Credit due to the ſolemn Atteſtations of ſubſcribing Witneſſes and public Perſons, ſuch as Notaries are. Herein then, I diſagree with the Conſtitution or Novel [illegible]; or at leaſt ſeem to do. There, it is ſuppoſed, that the Depoſition of Viewers is confirmed by the Signature of the atteſting Witneſſes and Notaries; but here, it is ſuppoſed on the contrary, that the Viewers differ with the Witneſſes, and conſequently that their conjectural Evidence is quite deſtroyed. There, the Depoſition or Verification of the Viewers, is ſtrengthened or authorized by the Credit due to the Act and the ſubſcribing Witneſſes; but here, the Conjecture or Preſumptions of theſe ſame Viewers are deſtroyed by both Literal and Teſtimonial Proof.

But to clear up the third Objection, it may be urged, that it is of evident Advantage to a Forgerer, to be able to take his Meaſures ſo as to avoid the Preſence of Witneſſes, or to render them Accomplices to his Crime, if preſent at the Commiſſion of the Forgery. For at this rate, it will be ſaid, that a Forgerer can never be convicted, unleſs it be by Similitude

geſta cui interreſſe non potuerint, teſtimonium auriti non oculati dicunto. Pet. de Leg. L. 4. T. 7. de qua lege Demoſth. in Orat. pro Coron.

tude of Hands. To this I anſwer, firſt, that to be ſure 'tis of great Advantage to one guilty of any capital Crime to have committed it in private, and without Witneſſes of any Kind. Who can deny but that it is of infinite Advantage to a Man arraigned for Robbery, Murder or Sacrilege, to have ſo taken his Meaſures as to have committed the Crime, if guilty, without being detected in the Commiſſion? In this Particular then, the Crime of Forgery has no greater Privilege than any other. But, in the ſecond Place, I anſwer, that the Difficulty of proving a criminal Fact, diſpenſes not a Proſecutor from amply proving the Crime alledged, nor a Judge from being thoroughly convinced before he paſſes a Sentence of Condemnation againſt the Perſon accuſed. There is a pregnant Inſtance of this in Caſes of Adultery already obſerved upon. There is no Crime whatever more difficult, from its Nature, to be diſcovered and prov'd than this. 'Tis a Crime, I may ſay, always committed in Secret and Obſcurity, and that ſcarce ever is perpetrated in the Preſence of any except the very Criminals themſelves: in ſhort, 'tis of ſuch a Nature, as that it would ſeem to conceal itſelf even from the Criminals themſelves. Yet for all theſe Difficulties, ſeemingly inſurmountable, was it ever known that Proſecutors were diſpenſed from proving this Crime by Witneſſes, or that a Judge had been authorized to convict upon ſimple Preſumptions? Never. It muſt not therefore be objected, that the Difficulty of coming at full Proof takes away the Neceſſity of it; nor ought it to be ſaid, that, in capital Proſecutions, a Judge might hazard the paſſing a Sentence of Condemnation without a thorough Conviction of the Guilt of the Accuſed.

In the ancient Law indeed, the Difficulty or ſeeming Impoſſibility of poſitive Proof in Caſes of Adultery, ſeem'd to have obliged the Judges to expoſe the Woman

Women accuſed, to the Proof of bitter Waters; as the *Ethiopians* did (1), to Trial by Fire; and as the ancient *Germans* (2) tried the Legitimacy of their Children by expoſing them to ſwim or ſink in deep Rivers. But theſe Means, whether miraculous, religious, or otherwiſe, are in nowiſe applicable to the ordinary Rules of Juſtice. The moſt that can be inferred from theſe ancient Methods, is, that in Crimes of difficult Proof, the Law was extremely tender of interpoſing its Authority, chuſing rather to leave that to the Diſcuſſion of Religion, which could not eaſily be decided by the Science or Wiſdom of the Law. It would ſeem, as if it had been intended by the Divine Legiſlator, that Man ſhould not interpoſe by his Conjectures and Preſumptions, where natural Proofs were ſo difficult to be come at; and that he deſign'd to reſerve to himſelf the Puniſhment of ſuch Offenders as could not be convicted by ſuch Proof as ought to convince a wiſe and upright Magiſtrate. This Thought is finely expreſs'd in one of the Capitularies or Decrees of *Charlemagne*, with which I ſhall conclude this Diſcourſe, as being appoſite to my Subject. (3) *Let not a Judge condemn any Man, without being perfectly ſatisfied of the Juſtice of his Sentence. Let him never diſpoſe of the Life of Man by Preſumptions: Let him firſt ſee that the Proof be clear, and then decree. 'Tis not him who is accuſed,*

M *that*

(1) Heliod. l. 10.

(2) Tacit. Hiſt.

(3) Nullus quemquam ante juſtum judiciam damnet, nullum ſuſpicionis arbitrio judicet. Prius quidem probre & ſic judicet. Non enim qui accuſatur, ſed qui convincitur reus eſt. Peſſimum namque & periculoſum eſt quemquam de ſuſpicione judicare. In ambiguis Dei judicio reſervetur ſententia. Quod certe agnoſcunt ſuo, quod neſciant divino reſervent judicio; quoniam non poteſt humano condemnari examine, quem Deus ſuo judicio reſervavit. Capit. Car. Mag. L. 7. Cap. 186.

that ſhould be deem'd guilty, but him who is convicted. There is nothing more dangerous or unjuſt, than hazarding to judge on Proof deduced from Conjectures only. All Caſes where the Proof conſiſts in Preſumptions, which extends no farther than the Formation of Doubt, ought to be left to the ſovereign Determinations of God. And Man ſhould know, that wherever God has been pleaſed not to impart the perfect Knowledge of a Crime, 'tis a Sign he did not intend he ſhould be Judge of the Commiſſion of it, but that he reſerved it for the Deciſion of his own Tribunal.

FINIS.